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1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF NEW YORK
3 - - - - - x
4 THE NATIONAL ASBESTOS :
WORKERS MEDICAL FUND, et al., :
5 :
Plaintiffs, Case No.
6 : 98 Civ. 1492 (JBW)
vs. :
7 :
PHILIP MORRIS, INC., et al., :
8 :
Defendants.
9 - - - - - x
10 BLUE CROSS and BLUE SHIELD of :
NEW JERSEY, et al., :
11 :
Plaintiffs, :
12 : Case No.
vs. 98 Civ. 3287 (JBW)
13 :
PHILIP MORRIS, INC., et al., :
14 :
Defendants,
15 - - - - - x
16
17 Videotape Deposition of DAVID T. SCHEFFMAN, PH.D.
18 Washington, D.C.
19 Thursday, April 6, 2000
20
21 Reported by: Susan D. Ashe, RMR
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8 Thursday, April 6, 2000
9 9:44 a.m.
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12 Videotape Deposition of DAVID T. SCHEFFMAN, PH.D.,
13 held at the offices of:
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15
16 Dewey Ballantine LLP
17 1775 Pennsylvania Avenue, N.W.
18 Washington, D.C. 20006
19
20
21 Pursuant to notice, before Susan D. Ashe, RMR, a
22 Notary Public of the District of Columbia.

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P R O C E E D I N G S

(Scheffman Exhibit Number 1 was marked for identification.)

VIDEOGRAPHER: In the United States District Court, Eastern District of New York, in the matter of National Asbestos Workers Medical Fund, et al., versus Phillip Morris, Incorporated, et al., and Blue Cross and Blue Shield of New Jersey, Incorporated, et al., versus Philip Morris, Incorporated, et al., Case Nos. 98-CV-1492 (JBW) and 98-CV-3287 (JBW).

This is the videotaped deposition of David T. Scheffman, Ph.D., taken this day, the 6th of April 2000, at the offices of Dewey Ballantine in Washington, D.C.

At this time I would ask counsel to identify themselves and state whom they represent.

MR. ANGLAND: Joseph Angland, representing the plaintiffs in the Blue Cross action.

MS. McDEVITT: Heather McDevitt, representing the plaintiffs in the Blue Cross action.

MR. MINTZER: Glenn Mintzer, Law

Offices of Peter Angelos, representing the plaintiffs in the National Asbestos Workers case.

MR. TURKEN: Jason Turken, from Sedgwick, Detert, Moran & Arnold, representing Brown & Williamson Tobacco Corporation.

MS. PHILLIPS: Amy Phillips, from Arnold & Porter, representing Philip Morris.

MR. STREETER: John Streeter, from Arnold & Porter, representing Philip Morris and -- that's it.

VIDEOGRAPHER: The officer before whom this deposition is taken and sworn by is Susan Ashe. Operating the video equipment is David Minken.

This videotaped deposition commences at 9:44. Please swear in the witness.

Thereupon,

DAVID T. SCHEFFMAN, PH.D.,

18 the Witness, called for examination by counsel for
19 the Plaintiffs, and, after having been sworn by the
20 notary, was examined and testified as follows:

21 MR. ANGLAND: Before turning to the
22 questioning, let me just state for the record and

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1 make sure we're all agreed that this deposition has
2 been cross-noticed in several cases, with the
3 understanding that it is therefore going to be deemed
4 a deposition taken in each of those cases.

5 Of course, certain portions of the
6 deposition may relate, as it turns out, to only one
7 particular case; but that's an issue of relevance,
8 not an issue of whether the deposition is, if you
9 will, available to be deemed taken in that particular
10 case.

11 Do we agree?

12 MR. STREETER: That's fine.

13 MR. ANGLAND: Okay.

14 Counsel want to add anything?

15 MR. MINTZER: No; that's fine.

16 MR. ANGLAND: All right.

17 EXAMINATION BY COUNSEL FOR THE PLAINTIFFS, BLUE
18 CROSS/BLUE SHIELD OF NEW JERSEY, ET AL.:

19 BY MR. ANGLAND:

20 Q Good morning, Dr. Scheffman.

21 A Good morning.

22 Q How are you today?

0010

1 A Fine.

2 Q Now, I understand you have been deposed
3 previously; is that correct?

4 A Yes.

5 Q And you have been, in fact, deposed in
6 other tobacco health-related cases; is that right?

7 A Yes.

8 Q And forgive me for going over the obvious
9 here, but I just want to make the record clear.

10 You understand that the testimony you're
11 giving today is under oath?

12 A Yes.

13 Q The same oath, in effect, that you would
14 be given if you were standing in the courtroom
15 testifying in front of the jury?

16 A Yes.

17 Q And you understand everything here is
18 being recorded?

19 A Yes.

20 Q All right. If at any point you don't
21 understand any of my questions, please let me know
22 and I'll do my best to clarify them. Okay?

0011

1 A Yes.

2 Q Now, you've submitted an expert report in
3 this case. What areas of expertise do you claim that
4 are relevant to that report?

5 A Well, I think, as I explain in my report:
6 Economics; marketing; and related to marketing,
7 analysis of fraud and deception.

8 Q Anything else?

9 A Well, no. I mean, economics and
10 marketing covers a host of issues.

11 Q In particular -- well, let's focus on

12 economics. I take it, you hold yourself out as an
13 expert in industrial organization economics; is that
14 right?

15 A Yes.

16 Q Okay. How about econometrics?

17 A Yes.

18 Q Okay. In marketing, are there any
19 subareas of marketing in which you hold yourself out
20 as an expert?

21 A Distribution, pricing, some issues having
22 to do with advertising, analysis of consumer fraud

0012

1 and deception.

2 Q Any others?

3 A That's what I can recall right now.

4 Q Is there any subarea relating to new
5 product development or introduction, in which you
6 claim to have expertise?

7 A Oh, yes. All right. Yeah.

8 I -- I have considerable expertise as a
9 business school professor and business consultant on
10 some areas, such as new product development.

11 Q Now, in the area of economics, is it fair
12 to say you developed your expertise while getting --
13 in the course of getting a doctorate in economics?

14 A Well, that's the beginning. That's the
15 first step.

16 Q Okay.

17 A But it's a life-long learning process --

18 Q All right. In marketing, when did you
19 become an expert in marketing?

20 A I don't -- from -- expert in what sense?
21 When was I first qualified as an expert in marketing?

22 Q When did you get to the point that you

0013

1 felt you could hold yourself out as an expert in
2 marketing?

3 A Well, certainly, on some specific issues
4 at the FTC that I dealt with, having to do with
5 advertising fraud and deception. And when I went to
6 Vanderbilt in 1989, I began to teach courses in
7 marketing.

8 Q Now, at the FTC, when you worked on
9 advertising issues relating to fraud and deception,
10 what was the nature of the work you actually did on
11 those matters?

12 A Participated in developing or
13 interpreting consumer surveys, copy tests, business
14 documents or other analyses of what the -- what the
15 apparent effect was of advertising in the
16 marketplace.

17 Q So the -- the area of marketing in which
18 you developed expertise during that activity related,
19 as I understand it, to interpreting consumer
20 responses to advertising?

21 A Well, it's -- again, there were -- I
22 mean, there -- there are various sorts of marketing

0014

1 and economic evidence that we would review as
2 economists at the FTC: Consumer surveys, in which we
3 participate in creating surveys that are interpreting
4 surveys; interpretation of copy tests; evidence from
5 various sources, company documents or other things

6 about what the intent, purpose, and effects of
7 advertising might be in the marketplace.

8 Q When you worked on these matters, did
9 the -- at the FTC -- did the FTC retain any outside
10 marketing experts?

11 A Occasionally.

12 Q Why?

13 A In terms of -- in litigation, the FTC, on
14 the consumer protection side, would usually use an
15 expert, an outside expert, rather than an inside.
16 Not always, but...

17 Q Now, on the antitrust side of the FTC,
18 they often use their own economists as experts in
19 litigations; is that correct?

20 A They have more recently. During my time,
21 that was -- that was unusual.

22 Q There was less litigation during your
0015

1 time on the antitrust side than there is now; isn't
2 that right?

3 A No. We actually had quite a bit. We had
4 quite a bit of litigation of various kinds.
5 But we didn't use those -- partly because
6 of the workload, we didn't -- we didn't use inside
7 economists as much as had been used previously.
8 And that was largely due to the, you
9 know, high workload of merger review that occurred in
10 the '80s that wasn't going on in the '70s. And I
11 think, more recently, they have used -- they have
12 used internal economists more as experts.

13 Q Going back for a moment to industrial
14 organization economics, what would you point to as
15 the leading written authorities in that field?

16 A Well, I don't think there is --
17 industrial organization economics is a very, very
18 broad area, encompasses all sorts of areas of --
19 micro-economics.
20 I don't think there is -- I don't think
21 there is such a thing.

22 Q Okay. Let's move away, then, from
0016

1 individual documents and move instead to people.
2 Who would you point to as being
3 authoritative spokesmen in the -- experts in the area
4 of micro -- I'm sorry -- in the area of industrial
5 organization economics?

6 A Well, there's many, many, many.
7 I don't -- I could name some names. But
8 it would -- you know, it would be misleading, you
9 know, because there are many people that are
10 prominent industrial --

11 Q I'm not going to ask you to exhaust --
12 exhaust the list.
13 But, you know, if I were to come to you
14 as a student and say: "I really want to read some of
15 the best stuff around in industrial organization
16 economics" -- realizing, Dr. Scheffman, you may not
17 agree with every word and -- that even the greatest
18 industrial organization economics says, but -- but --
19 but you know who the good ones are -- to whom would
20 you point me?

21 Among -- and again, you don't have to be
22 exhaustive here. But just give me some of the names.

0017

1 A Of people who are alive today?
2 Q No; I wouldn't limit it to that. You can
3 include Joe Bain, if you wish, or people of that ilk.
4 A Well, there were -- some of the people
5 who essentially started the discipline, Joe -- Joe
6 Bain and a more important professor at Harvard --
7 Harvard -- who I can't remember the name.
8 Q Professor Director?
9 A Certainly, yes; correct.
10 People in the so-called "Chicago school"
11 and people in the so-called "UCLA school."
12 Q Well, in the Chicago school, can you
13 think of anybody that you would deem an authoritative
14 source in the area of industrial organization?
15 A Most everyone in the Chicago school deems
16 themselves an authority. But the -- in the
17 industrial -- but, Aaron Director, obviously, was --
18 founded the school.
19 Milton Friedman, George Stigler, younger
20 people like Dennis Carlton, and a variety of other
21 people whose name escape me right now.
22 Q Okay. What about in the UCLA school?

0018

1 A Well, you have Alchian and Demsetz.
2 George -- again, there's a number of -- a number of
3 other people -- my classmate, John Riley, and other
4 people whose name I can't remember right now.
5 right now. This semester, are you teaching?
13 A Clearly not right now.
14 I'm not teaching this semester, no.
15 Q Okay. Are you affiliated with a
16 university at this point?
17 A Yes.
18 Q And what university is that?
19 A Vanderbilt.
20 Q Okay. What's your exact status? Are you
21 on leave of absence? Or -- or -- how would you
22 describe your relationship at this term?

0060

1 A I was a chaired professor at Vanderbilt
2 until last August. And I'm now a -- a non-chaired,
3 untenured professor of business strategy and
4 marketing --
5 Q I'm sorry. I didn't mean to cut you off.
6 A I still teach.
7 I changed my status to essentially being
8 a teaching professor, not -- not in residence.
9 Q And why did you make that change?
10 A Because I -- every 10 years, I do
11 something -- I change, do something completely
12 different. So -- which -- that's actually the
13 reason.
14 And I decided I wanted to do something
15 different. And -- and the different thing that I
16 chose to do this time is do -- spend much more of my
17 effort on -- on various consulting and research
18 projects than I had been able to do when I was a
19 professor.
20 Q About what portion of that consulting is
21 litigation-related?
22 A It -- it depends a lot on the period of

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1 time.
2 Q Say, the last four years.
3 I'm sorry. When did you -- when again
4 did you change your position at -- at Vanderbilt?
5 A August.
6 Q This August?
7 A Yes; last August, yeah.
8 Q Okay. Well, I guess all I could say is:
9 During the period from last August to the present,
10 about what portion of your consulting has been
11 related to litigation matters?
12 A Since last August, most of it.
13 Q Okay. And do you mean "most" as in 55
14 percent, 95 percent, or something in the middle?
15 A I'm not very good at this. I mean, I
16 do -- I do a lot of consulting that isn't -- that
17 isn't litigation. And how much of that really
18 depends on what comes in the door, what I choose to
19 do.
20 But I think, since last August, certainly
21 more than three-quarters of my time has been involved
22 in litigation.

0062

1 Q Do you do -- during that period, have you
2 worked on any mergers?
3 A Yes.
4 Q Are you including them in the litigation
5 or the non-litigation category?
6 A No, I'm not including them.
7 Q Okay. Now, those are matters where, I
8 guess, the theory is to try to avoid litigation --
9 let me back up.
10 Were you -- in all those cases, were you
11 representing the merging parties?
12 A No.
13 Q Okay. In some of those cases, were you
14 representing somebody who was opposing the merger?
15 A Yes.
16 Q Okay. And in all of those cases,
17 therefore, one side or the other was trying to avoid
18 litigation; is that right?
19 A No.
20 Q Can you describe the situation, the
21 merger situation, where nobody would have preferred
22 to avoid litigation?

0063

1 MR. TURKEN: Objection.
2 A I'm sorry. I don't understand that.
3 Nobody --
4 Q Well, what I'm trying to get at is --
5 let's sort of build up to it.
6 In a typical, simple merger investigation
7 before the FTC, an economist such as yourself might
8 go in to try to explain why a merger is
9 pro-competitive or at least not anti-competitive; is
10 that right?
11 A Correct.
12 Q Okay. And what the parties are trying to
13 do there, the merging paring to a basic industrial organization proposition.
9 A All right.
10 Q And again, acknowledging that you think
11 that the industry behaves differently than my
12 hypothetical -- I acknowledge that -- would you agree

13 that what makes entry into the market a disciplining
14 act regarding a conspiracy is the potential of the
15 entrant to acquire a large enough marketshare that
16 the costs of losing sales to the entrant outweighs to
17 the conspirators the increased profits they get on
18 the sales they retain?

19 MR. STREETER: Objection.

20 A No. I'm saying that's part of it. But
21 the -- more specifically, the issue is: Who is going
22 to take the hit?

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1 That is the -- that is the -- you're
2 referring to industrial organization analysis, which
3 is usually based on homogenous product industry. And
4 you say, "Well, whoever comes in, everyone takes the
5 same hit."

6 But particularly in branded product
7 industry, the -- the -- the hit that's taken depends
8 on the nature of the entry, the nature of the
9 conspiracy.

10 So it really depends on -- if you need
11 the actual -- all the conspirators to participate to
12 have it, then what's highly important is what is --
13 how is the hit experienced across the members of the
14 conspiracy?

15 As I've said in the case of Liggett --
16 you know, they might come in -- they might be small,
17 but they're going to hurt them very badly.

18 Q And in -- let me re-ask the question, but
19 focusing on it from a firm by firm perspective.

20 From the point of view of each firm that
21 is a conspirator, whether or not entry by another
22 firm would induce it to leave the conspiracy, would

0118

1 be a function of whether to that particular firm the
2 amount of profits -- the amount it loses to the new
3 entrant offsets the additional profits it gains on
4 the sales it retains; is that right?

5 A Yes.

6 Q And the same thing applies, does it not,
7 when conspirators are looking at one conspirator
8 who's on the margin and might choose not to
9 participate in the conspiracy -- whether the
10 conspiracy makes sense for the remaining conspirators
11 is a function of whether the profits, extra profits,
12 they make -- in this case, pack that they sell --
13 would outweigh losses they would sustain to that one
14 smaller industry member who chooses not to stay in
15 the conspiracy; isn't that right?

16 A The basic -- the basic economic calculus
17 is, you know, what -- trading off the sales lost for
18 whatever reason for -- for people in the industry or
19 people who enter or others -- versus the increased
20 profit can be made on the volume that's retained.

21 Q And when you do that calculation, the
22 smaller the marketshare of the fringe firm that's in

0119

1 the market or the potential entrant -- the smaller
2 the loss there is to the -- let's -- I -- let me
3 break it down one by one.

4 The smaller the potential marketshare of
5 the potential entrant, the less the downside, if you
6 will, of the conspiracy to the conspirators?

7 A Other things equal, yeah.
8 Q Okay. Do you have a view regarding
9 whether the structure of the tobacco industry is such
10 that it would be possible to have an effective
11 price-fixing conspiracy, assuming for a moment the
12 tobacco companies chose to ignore the antitrust laws
13 and went out and got into a smoke-filled room and set
14 prices?

15 A Yes. I think -- I think it -- it --
16 it -- in theory -- in theory could.

17 I mean, what we don't know I -- I
18 couldn't state that definitively, because we know
19 that price value brands on imports -- price value
20 brands are really important in the industry in
21 driving price competition, and that imports have been
22 very important.

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1 And so, for example -- you know, Philip
2 Morris acted, not because -- what RJR was doing.
3 Primarily, it was acting because of what was
4 happening in the price value segment in the market,
5 which was, in part, the little guys.

6 So I don't -- I don't know -- I don't
7 know for sure, though you'd have to take those
8 factors into account. But you do have -- you do have
9 other factors.

10 Q Would the answer be the same if I phrased
11 it in terms of a conspiracy to reduce output in the
12 market?

13 A Yes.

14 Q Would the answer be the same if I asked
15 about a conspiracy to allocate the market by
16 geography?

17 A That's -- that's -- you mean, in the
18 U.S.?

19 Q Yes.

20 A That's -- that's simply not possible.

21 Q Okay. Would the answer be the same -- as
22 your prior answer, not your geography answer -- if

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1 the question were about allocating the market by type
2 of product?

3 A Like what?

4 Q Well, for example, is -- do you have a
5 view regarding whether it would -- let me back up.

6 Are you familiar with the term "product
7 space"?

8 A Yes.

9 Q Are you familiar with some of Dick
10 Schmalemsee's work on product space?

11 A Yes.

12 Q Okay. So you understand that products
13 that are generally competitive with one another may
14 differ along certain dimensions, such as whether they
15 have a filter or not, or how much tar and nicotine
16 they have, or taste characteristics; is that fair?

17 A Yes.

18 Q Okay. Would it be possible that --
19 strike that.

20 Do you have an opinion regarding whether
21 it would be possible for firms in the tobacco
22 industry to have an effective conspiracy dividing the

0122

1 market up into product space, such that there were
2 agreements that certain companies would not enter
3 certain product space and other companies would not
4 enter other product space?

5 A No; I think -- I don't think that could
6 work.

7 Q Why not?

8 A Because we know, for example, that the
9 division between price value and premium, there's --
10 there's -- there's highly intense competition between
11 those two.

12 So, dividing them -- and that's why we
13 see, all of them have entered. Even the ones with
14 the strongest bans have reluctantly, as in all --
15 entered the price value segment, because it's just --
16 there's too much direct competition.

17 The price -- it doesn't make any sense.
18 You allocate between price value and the others. The
19 price value's the growing segment. Those are the
20 ones that, eating the lunch, are the premium brands.
21 That's -- that's not the way it would make sense for
22 anyone to divide things.

0123

1 Q Within the price value segment, are there
2 any differences among products?

3 A Sure.

4 Q Do you have a view regarding whether it
5 would be possible to allocate products within the
6 price value segment?

7 A I don't think it's -- again, my -- my
8 general conclusion on this is, it wouldn't make -- it
9 wouldn't be -- it wouldn't make economic sense for
10 the conspirators to try and do such an allocation.
11 And it -- and it couldn't work.

12 Q Why couldn't it work?

13 A Because it would -- it would, by its own
14 nature -- see, you allocate markets or products to
15 try and limit competition.

16 And I don't know how to limit -- you
17 know -- the way you think about allocating is, you're
18 highlighting the competition. You make the parties
19 in which -- you have sales primarily on price value
20 brand, in which their profitability hinges on them
21 getting an increased share over time, because they're
22 not -- of low-margin product.

0124

1 Their whole incentive is to compete
2 against the premium brands. That's -- you've --
3 you've allocated things that reinforces competition
4 rather than reduce it.

5 Q Well, isn't there also competition among
6 different price value brands?

7 A Yes.

8 Q And is it your testimony that it would be
9 impossible to allocate product space in the price
10 value brands among companies, with the result that,
11 by virtue of decreasing competition as to certain
12 attributes of price value brands, all companies would
13 wind up having higher profits?

14 A I just can't see what that would be.

15 Q Putting aside whether you could see what
16 it would be, have you reached a conclusion that it's
17 impossible?

18 A No.
19 Q Okay. Would it be possible -- do you
20 have an opinion regarding whether it would be
21 possible for tobacco companies to have an effective
22 agreement to restrict research and development --
0125
1 strike that -- to -- to -- to restrict development of
2 new products?
3 A Yes.
4 Q And what's that view?
5 A Well, as I expressed in my report and
6 various testimony, development of new products is --
7 if we talk about what the market -- what the
8 geographic and the product market is, we're talking
9 about lots of players, other than the defendants in
10 this suit --
11 Q Okay.
12 A -- that are highly resourceful and have a
13 long history of development.
14 Q Have you reached a conclusion regarding
15 whether it would be possible for U.S. tobacco
16 companies to have an effective agreement to restrict
17 the introduction, as opposed to the research and
18 development, of new products?
19 A Yes.
20 Q What's that conclusion?
21 A Well, as I expressed before: Again,
22 there's still -- there's lots of players worldwide.
0126
1 You have very big resourceful players -- Ban Tobacco,
2 Reetsma, and the Spanish -- and the Spanish Tobacco
3 Company, which is increasingly aggressive. You have
4 lots of players producing cigarettes everywhere in
5 the world.
6 Q How large a share of the United States
7 markets have these foreign companies, other than
8 British American Tobacco, acquired?
9 A Very small.
10 Q Have you done any analysis regarding
11 whether it would be practical for those brands to
12 achieve a substantial marketshare in the United
13 States?
14 A With respect to the issues in this case,
15 yes.
16 Q And what -- and your conclusion is?
17 A That is, if any -- anybody, anywhere in
18 the world came up with the magic bullet product, that
19 is -- the medical community said, "This is it" --
20 they'd be able to sell a lot of products very fast.
21 MR. ANGLAND: Okay. We need to
22 change the tape, I believe.
0127
1 VIDEOGRAPHER: Off the record at
2 11:52. End of Tape 1.
3 (A recess was taken.)
4 VIDEOGRAPHER: Back on the record at
5 11:53.
6 BY MR. ANGLAND:
7 Q In your litigation consulting work, in
8 about how many different industries have you examined
9 the question of whether there was a conspiracy?
10 A You mean, since leaving the FTC?
11 Q Yes.

12 A I, you know, would have to look at my
13 resume -- a number.
14 Q Ten? As many as ten?
15 A Whether there actually was a conspiracy?
16 Q Yes.
17 A Not -- not -- not more than 10.
18 I mean, we could -- if we went down
19 through my resume and a number of other things, we
20 probably could figure out more precisely.
21 Q Okay. We may do that in a little bit.
22 In how many of those industries, if any,
0128
1 did you conclude that there was a conspiracy?
2 A Two or three.
3 Q Okay. Which industries are those?
4 A One is confidential.
5 One is on my resume as the -- the --
6 what's the name? -- the road maintenance case in
7 Southern Illinois.
8 In connection with my work on milk
9 price-fixing cases, I talked to people that were
10 involved in a conspiracy; and they told me, you know,
11 what they did and what the conspiracy was about.
12 And I have -- in another -- in a
13 confidential matter, it's been exactly the same --
14 that, you know, they said they were a conspiracy.
15 They were parties to it. They explained to me how it
16 worked.
17 Q The confidential matter that you just
18 referred to now, was that the same confidential
19 matter that you talked about --
20 A Yes.
21 Q -- a moment ago?
22 A Yes.
0129
1 Q Okay. So in the confidential matter and
2 in the milk conspiracy, the participants -- or at
3 least some of the participants in the -- in the
4 conspiracy admitted to you that they had been
5 involved in the conspiracy; is that right?
6 A Yeah; but that wasn't the -- it wasn't
7 just that. Okay? Because --
8 Q I recognize you may have done additional
9 work. But I --
10 A No. But I didn't -- it wasn't just that
11 they -- you know, I -- I sat down and said -- you
12 know, what -- "Tell me what you did, exactly" --
13 etc. -- "How did this work?" -- rather than saying
14 something had happened, you know.
15 It seemed clear to me, and them
16 explaining what exactly they had done, that they
17 clearly had been part of a -- an attempted
18 conspiracy.
19 Q Okay. In the road maintenance case in
20 Illinois, in that one did anybody admit that they had
21 been involved in a conspiracy?
22 A No.
0130
1 Q But you concluded in that case that there
2 had, in fact, been an conspiracy; is that --
3 A Well, I may have answered too quickly at
4 the beginning of this.
5 I don't ever conclude that there is a

6 conspiracy. That's for the fact finder to determine.
7 I -- I -- I concluded, the economic
8 evidence was consistent with there having been a
9 conspiracy.

10 Q Um-hum. And by whom are you retained in
11 that matter?

12 A By plaintiff.

13 Q In how many of the other cases, in which
14 you in your private consultant capacity examined the
15 issue of conspiracy, were you retained by the
16 plaintiff?

17 A In a Section 1 allegation?

18 Q Yes.

19 A Right.

20 I named three or -- well, retained by the
21 plaintiff -- since the FTC, probably two or three.

22 Q Okay. Which industries were those?

0131

1 A Well, at the road building, I worked on a
2 case in Nashville involving a alleged occlusive
3 boycott.

4 Q Was there a dispute regarding whether
5 there had, in fact, been a -- a boycott -- that is, a
6 conspiracy to not deal with somebody?

7 A Well, the -- certain of the -- the
8 parties that were party to the alleged conspiracy
9 said, of course, there wasn't.

10 But the economic evidence certainly
11 didn't seem to confirm that conclusion. And that was
12 a matter that -- that settled after six months or
13 something.

14 Q So in your view, the economic evidence
15 suggested that there was a conspiracy; is that right?

16 A The economic evidence, certainly, that I
17 looked at indicated there was -- there was concerted
18 activity of boycott in an attempt to cut off supplies
19 to the plaintiff in the case.

20 Q What industry was that?

21 A That was house contracting.

22 Q Okay. Besides the road maintenance case

0132

1 and the house contracting case, were there any other
2 cases in which you were retained by a plaintiff in a
3 case to address the question of whether the economic
4 evidence was consistent with a conspiracy?

5 A That's what I can recall today; and if we
6 refer to the -- my resume, we might find something
7 else. But...

8 Q Okay. To the best of your current
9 recollection, is it true that, in every case that you
10 have been retained by the plaintiff to determine
11 whether a conspiracy existed, you concluded that the
12 evidence was consistent with a conspiracy?

13 A No.

14 Q And can you tell me the -- the cases
15 where you were retained by a plaintiff, where you did
16 not reach that conclusion?

17 A Well, I've -- I've worked on cases in
18 which -- would have been -- which I was retained as a
19 consulting expert. And I decided that I didn't -- my
20 conclusion didn't support their opinion.

21 Q Okay. And which industries did those
22 involve?

0133

1 A I -- I don't -- I -- I don't know if I
2 can remember. I think I can remember something
3 having to do with the general telecommunications
4 industry.

5 Q Do you recall which segment of that
6 industry?

7 A No.

8 Q Can you recall any other cases where you
9 were retained by a plaintiff to look into the
10 conspiracy issue, and after reviewing it concluded
11 that the evidence did not support the existence of
12 conspiracy?

13 A Not that I can recall today.

14 Q Okay. Do you know if there were any
15 others?

16 A I just -- I can't recall.

17 Q Okay. Let's look at the other side.
18 Have there been any cases where you were
19 retained by a defendant to address the conspiracy
20 issue, and you concluded that the evidence was
21 consistent with there being a conspiracy?

22 A Not that I can recall.

0134

1 Q Okay. Now -- I'm sorry.

2 A As you know, it's more complicated than
3 that. If you get to the point of actually doing a
4 lot of work and everything, you're probably far
5 enough long that you -- that you have a conclusion.

6 Now, very often, as you know, you're
7 retained and you look at something and say, "Well, I
8 don't think I -- I don't -- my guess is that -- I
9 don't know if it will work yet, but my guess is, it's
10 not going to come out right."

11 So you don't -- you end up not taking the
12 retention or not getting retained.

13 Q Do you -- can you identify cases where,
14 when a defendant approached you in a case, that
15 happened?

16 A Yeah, I think so.

17 Q Okay. What industry?

18 A It's been the consumer product industry,
19 I think.

20 Q Do you recall which consumer product
21 industry?

22 A It was a confidential engagement. No. I

0135

1 don't -- no. I think it was some sort of -- some --
2 well, it may have been a consumer product or some
3 ingredient that goes into a consumer product or
4 some --

5 Q How long ago was that?

6 A I don't know, sometime in the last
7 several years.

8 Q Now, in the course of your work on
9 smoking and health issues, have you come to any
10 conclusion regarding whether smoking is a significant
11 contributor to certain health problems?

12 A Well, as I have testified, I'm not --
13 I've reviewed the Surgeon General -- very -- many of
14 the Surgeon General's report -- I rely on the Surgeon
15 General's opinion.

16 So I think that -- yes, I think for a lot

17 of people smoking is a significant cause of -- of
18 health problems.

19 Q And based upon your review of the
20 literature in the smoking and health area, did there
21 come a point in time at which there was something of
22 a consensus in the medical and/or scientific

0136

1 communities regarding whether smoking was a
2 significant contributor to diseases?

3 MR. STREETER: Objection.

4 A That's really a very interesting
5 question. It goes on what you -- what you determine
6 by a "consensus."

7 So you have -- that's very important,
8 "consensus" -- what -- what do you mean by
9 "consensus"?

10 Are you -- in the early 1950's in the
11 U.K. -- medical body included -- essentially came to
12 the conclusion similar to 1964 Surgeon General's
13 report.

14 In 1957, Surgeon General Bernie and the
15 Public Health Service came to a similar conclusion
16 and stated it. But there was certainly no consensus
17 in the U.S. There were hearings about it and
18 everything.

19 As they admit, you know, there was --
20 there was a substantial percentage of medical people
21 at that point that were on the other side.

22 By 1964, in which the Surgeon General's

0137

1 committee was convened -- and they came to a
2 conclusion, which was a consensus of the committee.

3 There were certainly -- a lot more of the
4 medical community accepted the -- accepted the
5 conclusion of the Surgeon General. But there were
6 still a number of prominent medical researchers that
7 disagreed.

8 Q Prior to -- at some point prior to 1964,
9 a majority of the -- the medical/scientific community
10 who had knowledge concerning smoking and health had
11 come to the conclusion that smoking created health
12 problems, hadn't they?

13 A It's -- it's difficult to be, you know,
14 factually precise about that.

15 Surgeon General Bernie testified in '57
16 that he thought maybe 25 percent of the medical
17 experts disagreed with his conclusion. That was
18 his -- that was his opinion.

19 Q Okay. And I -- strike that.

20 Okay. And does it follow that about 75
21 percent agreed with his opinion?

22 A Well, that was according to his opinion.

0138

1 But, see, the problem is: If you read
2 the whole -- if you read the whole record, you
3 have -- during that same period of time, you have
4 high-ranking officials in the AMA stating something
5 quite contrary.

6 So I don't -- I don't know that we -- I
7 don't think we have any -- I don't think we have any
8 precise information about, you know, what -- what
9 category of people and -- like, did most doctors --
10 did those doctors believe it in 1957?

11 Well, we have a survey of it. One thing
12 is that they, you know -- we have this -- it's -- and
13 it's an interesting survey. Yeah.

14 But -- the majority of doctors at the
15 time were smokers and continued to smoke and didn't
16 change their smoking behavior because of the
17 publicity at the time. So it's kind of hard to tell.

18 We do know, from the early '50s onward
19 more and more of the medical community and certainly
20 more and more of the public -- maybe more of the
21 public than the medical community -- believed there
22 was a problem.

0139

1 Q I'm sorry. Was there a -- was it at some
2 point between 1954 and 1964 that a consensus emerged
3 that smoking had adverse health consequences?

4 MR. STREETER: Objection.

5 A No -- well, as you recall, what happened
6 is that the Kennedy Administration and the Surgeon
7 General decided to convene a special committee to
8 look at the smoking and health question, and report
9 to the Surgeon General. And that of course became
10 the 1964 Surgeon General's report.

11 And that -- that became a consensus of
12 the -- of the U.S. government, of the Surgeon
13 General.

14 And more than -- more than that, that
15 Bernie had decided in '57 that it was a -- you know,
16 that it was a consensus of the U.S. -- as a statement
17 of public policy by the U.S. government -- that
18 smoking was dangerous -- was -- was potentially
19 dangerous.

20 Q Now, moving away from the use of the --
21 the word "consensus" for a moment, can you tell me,
22 based upon your review of the history of the smoking

0140

1 and health issue in the United States -- can you tell
2 me at what point in time there was first substantial
3 evidence that smoking had an adverse effect on
4 health?

5 And -- well, let me rephrase that,
6 actually. I used the word "substantial." I -- I
7 really should have said "credible," because I'm
8 talking not about the quantity of evidence, but
9 rather about the believability of evidence. So let
10 me restate the question.

11 At what point was there credible evidence
12 that smoking had a significant adverse effect on
13 health?

14 MR. STREETER: Objection.

15 A That's a very difficult question.

16 I think the best way to think about this
17 is that people -- people think that science and
18 medical research is sort of like black and white.

19 In fact, the final decisions by
20 governmental bodies and medical authorities on the
21 smoking/health issue was really much more of a legal
22 proceeding, in that -- looking at all the evidence,

0141

1 much of it very qualitative, and look at the weight
2 of the evidence, and looking at what the risks of
3 being wrong, with the Type 1 and Type 2 error --
4 that's a -- fundamentally -- I've reviewed a lot of

5 smoking and health research, and Surgeon General's --
6 I mean, fundamentally, why we believe that smoking --
7 the scientific basis, the main scientific basis for
8 why we believe that smoking is implicated in a
9 volume -- in a number of diseases -- is
10 epidemiological evidence.

11 Because the other -- the other scientific
12 evidence, like animal evidence and things like that,
13 would be -- would be indirect.

14 The problem in smoking and health is: We
15 don't -- unlike AIDS or pneumonia or whatever, we
16 don't -- can't identify, this is the agent, this is
17 how it works, this is its -- this is what it
18 produces.

19 Smoking is -- we don't know. No one
20 knows, in smoking, what it is and how it works. It
21 just -- so the fundamental evidence is
22 epidemiological.

0142

1 And so, you have -- historically, you
2 have epidemiological studies -- and that was the most
3 important thing -- showing in the -- by the early
4 '50s, a dramatic increase in lung cancer. And
5 that -- and that seemed to be related to smoking.

6 Q So --

7 A But at the same time, then you had Doll &
8 Wynder and other ones doing mouse-skin paintings,
9 saying, "Well, here's -- might be a reason."

10 But that was on the backs of mice. It
11 was interesting. But it didn't -- it didn't prove
12 anything.

13 But, overwhelmingly, the evidence was
14 epidemiological. And what became more conclusive,
15 over time, is getting better, longer-run
16 epidemiological evidence that showed statistically
17 that it was difficult to find that there was some
18 other -- that it -- that it could be anything else.

19 Q Do you have an opinion regarding when, in
20 the United States, there was first credible
21 epidemiological evidence that smoking caused
22 significant health problems?

0143

1 MR. STREETER: Objection.

2 A See, the real problem is cause.

3 And the real problem here, as a matter of
4 science, was that the main evidence -- the main
5 evidence on which everyone in the end really relies
6 is epidemiological and statistical evidence.

7 And statistical evidence can't show
8 cause. It can just say it's more likely than not.
9 But you never know for sure. Maybe it's something
10 else.

11 And that was what, in the early -- for
12 many years in the industry, a number of people said,
13 "Well, it really is something else. It's air
14 pollution. People have been smoking for hundreds of
15 years. Why would it be a problem now?"

16 Q Let me use your words, then.

17 Do you have an opinion regarding
18 whether -- well, strike that.

19 Do you have an opinion regarding when the
20 epidemiological evidence was such that it credibly
21 suggested that it was more likely than not that

22 smoking caused substantial adverse health effects?

0144

1 MR. STREETER: Objection.

2 A I can't -- I'm not the scientific expert.

3 I can say, at each point you could see --

4 in 1964, the Surgeon General committee made a
5 decision. And it made -- you know, in my view, the
6 most important evidence was epidemiological. It was
7 still early. More epidemiological evidence was
8 accumulated.

9 At each step in the industry in 1964,
10 people commenting on the Surgeon General hearings.

11 Comments -- comments to the Surgeon General.

12 Many Congressional hearings for many
13 years have had prominent medical and scientific
14 experts saying, "It's not right. I don't believe it,
15 because look at the statistical analysis that has these
16 anomalies that don't make any sense, and other things
17 that -- you haven't -- you know, there's no evidence
18 here about what the mechanism is and how it works."

19 So there always have been some prominent
20 scientific people, less over time, that -- that
21 concluded that they didn't believe that the -- that
22 the evidence supported the Surgeon General's

0145

1 conclusion.

2 Q Okay. And now, bear in mind, I'm not
3 asking about consensus. I say that just as a -- as a
4 preface.

5 As of 1964, was there credible
6 epidemiological evidence that smoking caused adverse
7 health effects?

8 A The Surgeon General's committee thought
9 there was, certainly. I don't --

10 Q Do you have an opinion regarding whether
11 that was a reasonable conclusion?

12 A Well, I'm not -- I -- I -- I accept the
13 conclusion.

14 Q Do you have an opinion regarding whether,
15 at some point prior to 1964, there was credible
16 evidence -- credible epidemiological evidence that
17 smoking caused adverse health effects?

18 A See, you're not -- I'm not -- I'm not the
19 expert here.

20 And -- I know -- and it's very important,
21 because people who really, clearly, were experts in
22 this area, for many years disagreed with the

0146

1 conclusion. Okay?

2 So I'm not -- I -- I -- as a -- as a
3 layman, knowing something about the science, I would
4 agree with the '64 Surgeon General's report,
5 because -- but it's in part because of the
6 Type 1/Type 2 error.

7 Suppose he's -- for some reasonable
8 chance, he's right -- you know, that's -- I give a
9 lot of weight to that conclusion, because the
10 alternative is -- the alternative is, there's -- that
11 the cost benefit analysis, it's better to agree with
12 it, because the cost of being wrong on the other side
13 is too high.

14 Q Now, my question, recall, was whether you
15 had an opinion. I understand your point that you are

16 not a medical expert, as such.
17 So does that mean that your answer to the
18 question is, no, you don't have an opinion?
19 A On what?
20 Q Do you have an opinion regarding whether,
21 prior to 1964, there was credible epidemiological
22 evidence indicating -- and it was more likely than
0147
1 not -- that smoking produced substantial adverse
2 health effects?
3 A No. There -- there -- there was clearly
4 no study or group of studies which -- which
5 scientifically -- on scientific method, experts could
6 say, "Yes, it's proven."
7 And that's not what happened in '64.
8 In 1964, the committee viewed all the --
9 all the evidence of all kinds in record. And they
10 decide, in the end, in weighing all the evidence --
11 and -- and in many ways, very qualitative, subtle
12 ways -- and they say, "It's our conclusion that
13 such-and-such is true."
14 Q So is it your testimony, then, that prior
15 to 1964 there was no credible epidemiological
16 evidence suggesting that it was more likely than not
17 that smoking caused substantial adverse health
18 effects?
19 A There was -- I don't know what you mean
20 by "credible."
21 It was clearly an open issue. There were
22 studies that -- there were studies that went both
0148
1 ways. There were studies and evidence -- evidence
2 mounted over time -- studies, more supporting the
3 conclusion of adverse consequences of smoking.
4 And that's continued to this day. More
5 and more evidence has continued to this day.
6 I'm saying, it was a -- it was a -- the
7 Surgeon General's committee was public -- making a
8 public policy. The science didn't say and the
9 committee never said, "It's black and -- the science
10 is black and white. It's -- it's like AIDS or
11 pneumonia. We know. Here is what it is. It's
12 true."
13 We've never had that situation with the
14 cigarette.
15 Q Based upon your study of the smoking and
16 health industry, do you have an opinion regarding
17 whether the tobacco companies, or any of the tobacco
18 companies, after the point -- after a point at which
19 there was a consensus that smoking more likely than
20 not caused adverse health effects, took the position
21 that smoking did not cause such effects?
22 MR. STREETER: Objection.
0149
1 A Consensus by who? And what do you mean
2 by "consensus"?
3 Q Well, I think you used the word earlier.
4 I -- I could be wrong, but I thought you used it
5 before I did.
6 A No. I thought I -- I thought you started
7 it. And I started out by saying --
8 Q Well, maybe.
9 A -- I'm not quite sure what you mean by

10 that.

11 We know -- by 1964 -- there was a
12 broad -- there was a broad-based consensus by
13 consumers that there were -- there might be serious
14 problems with cigarettes.

15 If we follow the scientific research, we
16 find more and more are -- less and less people
17 willing to dispute the conclusion in the scientific
18 community.

19 So we have the Surgeon General's report
20 in '64; and that's a consensus of a government body
21 about what's best for public policy in the U.S.

22 And certainly, at that point and after,
0150

1 the -- the industry and the companies took a
2 different position.

3 Q Are you aware of any point at which the
4 companies, the tobacco companies, took a position on
5 smoking and health that was inconsistent with the
6 overwhelming body of scientific thought on the
7 subject?

8 MR. STREETER: Objection.

9 A Well, "overwhelming body" is a -- is a
10 little bit -- the -- well, we know that the industry
11 took a position contrary to what the Surgeon General
12 decided in '64, contrary to what Surgeon General
13 Bernie concluded in '57, contrary to what -- the
14 Surgeon -- in some respects, contrary to what later
15 Surgeon General's reports show.

16 Q Do you have a view regarding whether
17 nicotine is an addictive substance?

18 MR. STREETER: Objection.

19 A I'm not -- I'm not an expert on addiction.
20 I know, as -- I know from my research and
21 from just -- from growing up with smokers -- for some
22 people, cigarettes are highly habit-forming.

0151
1 If it -- "addiction" is a matter of -- a
2 medical term.

3 Q Have you ever used the word
4 "habit-forming" -- now, to include both mild
5 habit-forming and addiction -- cover the whole range
6 of, if you will, medical or psychological phenomena
7 that might make somebody want to re-use a particular
8 product and find it difficult to resist in doing
9 that. I'll use your term.

10 Are you aware of any statements by the
11 tobacco companies that you believe were inconsistent
12 with the clear evidence regarding the extent to which
13 cigarettes were habit-forming?

14 MR. STREETER: Objection.

15 A Well, we know, of course, that the
16 executives testified -- a number of executives
17 testified to -- in their belief, cigarettes weren't
18 addictive.

19 But that was not your -- you're talking
20 to non-scientific people and -- issues.

21 What do you mean by "addictive"?

22 I mean, it's -- if the -- if -- if the

0152
1 Surgeon General says -- and the public health
2 authorities say, "Addiction means 'this.' This is
3 what it means. And so, cigarettes fit that

4 definition," that's -- by that definition, that's
5 addictive.
6 Q Um-hum.
7 A As a matter of scientific definition.
8 Q What's happened to smoking prevalence in
9 the United States since 1954?
10 A Declined dramatically.
11 Q Why?
12 A Because -- because people overwhelmingly
13 realize the whole health-care -- that there are
14 health-care risks. They are -- people are better
15 informed -- better educated, probably. And less
16 people choose to smoke.
17 Q Does being better educated decrease the
18 likelihood that people will smoke?
19 A If you look at the demographics, yeah --
20 yeah, the demographics used, you know, towards lower
21 income, lower education, people and smoking
22 prevalence.

0153

1 Q How does education in the United States
2 compare, on average, to -- the extent of education
3 compare to education in foreign countries, in terms
4 of the average amount of education?
5 A It depends on the country.
6 Q Okay. Let's -- let's limit it to -- for
7 the moment, to European countries.
8 A Depends on the country.
9 Q Okay. Can you generalize, across the
10 European countries?
11 A Well, historically, by -- by measures of
12 how far you go in public education is one measure.
13 What percent of the population goes past public
14 education to college and things like that, the U.S.
15 has historically been had ahead of many European
16 countries.
17 Q How many European countries have higher
18 average annual income than the United States?
19 A Not very many.
20 Q And let's not limit it to Europe now.
21 How many countries throughout the world have higher
22 average annual income than the United States?

0154

1 A Very few.
2 Q So, holding everything else constant, as
3 economists sometimes are wont to do, you would expect
4 smoking prevalence to be higher in other countries
5 than in the United States, if you just focused upon
6 the comparison of income; is that right?
7 A It could. It depends, culturally.
8 I mean, income cuts -- income cuts two
9 ways, because smoking is, for regular smokers, a
10 substantial expense. So higher income cuts two ways.
11 Q And --
12 A A given smoker -- for a -- for a person
13 who is going to smoke, higher -- higher income other
14 than people buying because they -- they might smoke
15 more -- they might smoke more expensive cigarettes.
16 It depends, culturally.
17 Q And in the United States, looking at
18 the -- the two things that cut different ways, the
19 fact that, on the one hand, would -- higher-income
20 people tend to smoke less -- but on the other hand,

21 if you're very poor, you can't even afford the money
22 for cigarettes -- when you consider those two

0155

1 competing factors in the United States, the way they
2 net out is that the higher your income, the less
3 likely you are to smoke; isn't that right?

4 MR. STREETER: Objection.

5 A No. That -- that -- the higher -- I was
6 talking about, specifically in the U.S.

7 And I was talking about, if you just look
8 at the data, the cost -- data, the higher-income
9 people in the U.S. have lower prevalence of smoking.

10 That's in the U.S.

11 Q And that's notwithstanding the fact that
12 they had more money available to spend on cigarettes
13 in the United States?

14 A Correct.

15 Q Okay. Let's talk about OPEC.

16 Well, for the record, what is OPEC?

17 A It's a organization of many of the major
18 oil-producing countries.

19 Q Now, from -- at various times, has OPEC
20 engaged in conduct that is, in essence, a
21 price-fixing conspiracy, putting aside the fact that
22 it may be legal because it may be done by foreign

0156

1 governments, who are not subject to our antitrust
2 laws?

3 A Well, it's -- firstly, the -- the -- it's
4 actually an output restricting conspiracy rather than
5 a price, in effect, is similar. But --

6 Q Right. From an economist's point of
7 view, given the -- the nature of supply and demand
8 curves -- if you -- if you specify output, you're
9 essentially agreeing on price; isn't that right?

10 A If -- if -- unless there's some other
11 parties at play --

12 Q Okay.

13 A -- that aren't part of your -- part of
14 your gang.

15 Q All right. Now, has OPEC, at times --
16 has the -- has the OPEC agreement, in their
17 agreements on output with their effect on price, at
18 times, had the effect of substantially increasing
19 gasoline prices in the United States?

20 A Yes.

21 Q Okay. Are we in such a period now?

22 A Yes.

0157

1 Q And there is that period some years ago,
2 with the long gas lines at gas stations -- was that,
3 at least in part, a result of the output/price
4 conspiracy by OPEC?

5 A Well, gas lines were the -- were the
6 result of government policy. But an increase in
7 price, that was due to OPEC, yeah.

8 Q Okay. Fair enough.

9 Have there been times where OPEC has been
10 ineffective at raising prices?

11 A Yes.

12 Q Essentially, some competition broke out
13 in the middle of the conspiracy; is that fair to say?

14 A No. A couple -- one is always -- in the

15 conspiracies, you have disagreements between the
16 parties.
17 So some people -- even though they may go
18 and agree on the quotas, they violate them. And then
19 you have -- in some -- in recent years, you've had
20 some major players, like the Russians, who aren't
21 really members and sort of go -- go their own way.

22 Q And yet, after certain of those periods,
0158

1 OPEC at various times then was successful in raising
2 prices as a result of its conspiracy; is that right?

3 A Yes.

4 Q So the fact that there are occasional
5 periods where there aren't adverse competitive
6 effects from a conspiracy doesn't prove there is not
7 a conspiracy, does there?

8 A Correct.

9 Q Okay.

10 A But it doesn't -- but it proves -- it
11 doesn't prove things one way or the other.

12 It proves -- you know, at a minimum, lack
13 of absence of a conspiracy. And depending on the
14 ubiquity of it, it casts considerable doubt on
15 whether there was a conspiracy, whether such a
16 conspiracy was plausible.

17 Q As an economist, would you agree that, if
18 there were an agreement among tobacco companies that
19 had the effect of simply reducing their output of
20 products, that that would be anti-competitive?

21 A Yeah.

22 Q Do you agree that, if there were an
0159

1 agreement among tobacco --

2 A Pursuant to -- well, that's, maybe, a
3 little bit too general an answer.

4 But, certainly, a -- a -- an agreement --
5 you know, a naked antitrust sort of agreement, we're
6 going to respect output for the purpose -- because
7 we'll make more money and price will go up. Yeah.

8 Of course, that would --

9 Q And, in fairness, that is exactly what I
10 had in mind.

11 A Right.

12 Q As an economist, would you agree that if
13 the tobacco companies agreed to not introduce safer
14 products, if they made such an agreement, would that
15 be anti-competitive?

16 A It -- it could be.

17 Q Under what circumstances would it not be?

18 A Well, one issue is effect in an
19 anti-competitive -- would it -- did it -- would it
20 have any effect?

21 And as you know -- I mean, there -- there
22 is -- this is a very tricky issue.

0160

1 As you know, you can have situations
2 where industry, because of industry standards, say,
3 "We're going to agree not to produce widgets anymore
4 with -- with English threads instead of metric
5 thread."

6 That's an agreement not to introduce
7 products. That would -- that wouldn't necessarily be
8 anti-competitive. You'd have to know the nature of

9 the situation.
10 Q Now, the example I gave here was "safer
11 products," products that are truly safer. And they
12 are, to that extent, better than other products.
13 If there were such an agreement to -- and
14 it were implemented -- that is, to not introduce
15 safer products that would otherwise have been
16 introduced -- would that be anti-competitive?
17 A Yeah.
18 Q And would the same be true if the
19 products were introduced but, by virtue of the
20 agreement, they were introduced years later than they
21 would otherwise have been introduced, these safer
22 products -- would that be anti-competitive?

0161
1 A Well, if you're talking about -- we're
2 talking about a naked antitrust agreement where, for
3 the purposes of restricting output and raising prices
4 or whatever, we're going to agree to do that -- that
5 sounds like it would be anecdotal.

6 Q Okay. And now let me go back to a more
7 general form of the question. Let's put aside what
8 their intent was, whether -- whether it was an intent
9 to restrict the -- the quantity of -- of safer
10 products or whether it was -- whether that was the
11 ultimate goal, or whether it was because they feared
12 collateral effects on their public image if they had
13 to admit that there had been something unsafe about
14 their prior products.

15 Let's put aside, entirely, what their
16 rationale is and just ask: If the companies agreed
17 to -- and did -- slow down the introduction of new,
18 safer products -- they actually did slow down to a
19 substantial degree the introduction of new, safer
20 products -- would that be anti-competitive?

21 MR. STREETER: Objection.

22 A I don't think that's because it's -- I
0162
1 mean, I can't -- I can't make a conclusion as a
2 matter of law.

3 I can say -- as an economist, I could
4 look at what the effect -- I could look at whether
5 the effect was anti-competitive or not.

6 Q If the effect was, the consumers didn't
7 get safer cigarettes as quickly as they would have
8 liked to have received them, would the effect be
9 anti-competitive?

10 A It again would be the extent. How much
11 would have been purchased?

12 Q If a substantial number of consumers
13 would have liked to have had that product.

14 MR. STREETER: Objection.

15 A If they would have -- if they would
16 have -- if they would have been offered at a price
17 and in other qualitative features that consumers
18 would have bought a substantial amount of them and
19 they actually were safer, yeah.

20 Q Okay. As an economist, do you have a
21 view regarding whether an agreement among tobacco
22 companies not to advertise the health benefits of

0163
1 certain safer cigarettes would be an antitrust
2 violation?

3 MR. STREETER: Objection.
4 A Well, you asked for a legal conclusion.
5 But...
6 Q I asked -- I asked you --
7 A That -- that -- that's a --
8 Q Yeah. Let me rephrase it. That's a fair
9 point. I should have said whether it would be
10 anti-competitive. And I will -- I will rephrase it
11 that way.
12 Do you have a view, as an economist,
13 regarding whether an agreement among tobacco
14 companies not to advertise the health benefits of
15 certain cigarettes would be anti-competitive?
16 A No, not necessarily.
17 In fact, the antitrust authorities in the
18 U.S. decided that exactly such an agreement was
19 not -- apparently not anti-competitive.
20 Q In what -- in what context are you
21 talking about the U.S. antitrust authorities deciding
22 that?

0164

1 A I'm talking about the Code.
2 Q Okay.
3 A Industry code.
4 Q And that's -- and that -- that is a
5 code -- is that an agreement among the companies? Is
6 that a way -- a fair way to characterize that?
7 A Well, don't ask my legal opinion.
8 We knew all the companies participated in
9 the code, and at various points agreed to abide by
10 the -- the decisions of the code and authority.
11 Q Okay. Do you have a view as an economist
12 whether an agreement among tobacco companies to
13 restrict research and development to some significant
14 degree would be anti-competitive?
15 MR. STREETER: Objection.
16 A That -- that depend -- that -- that
17 depends on the nature of the research and development
18 and the effect.
19 Q Under what circumstances would an
20 agreement among competitors to restrict research and
21 development not be anti-competitive?

22 A Well, as I -- as I concluded in this
0165

1 case, even if there was an agreement not to do
2 in-house biological research on intact animals, or
3 whatever the theory would be, that -- that such an
4 agreement -- if the parties were free to do such
5 research outside their premises -- and, in fact, did
6 all the time, including in their premises -- that --
7 that an anti-competitive effect couldn't flow from
8 that.
9 Q As an economist, do you have a view
10 regarding whether an agreement that had the effect of
11 reducing the tobacco companies' total research and
12 development, and the total research and development
13 done by any agents or consultants they hired --
14 whether such an agreement would be anti-competitive?

15 MR. STREETER: Objection.
16 A Well, I think the way we -- the way we
17 analyze that in economics is to try and figure out
18 whether there was any material consequences that --
19 arising out of a -- out of a -- such -- out of such

20 an agreement.
21 I mean, it's -- it's too difficult to --
22 it's a Rule of Reason sort of issue. You have to
0166
1 analyze the circumstances and look at the effects.
2 Q Well, at least this time it was you who
3 introduced the legal concept. I say that in jest,
4 not by way of criticism.
5 But since we talked about the Rule of
6 Reason, is it your position that an agreement between
7 competitors that had the effect -- whose only effect
8 was to reduce the quantity of research and
9 development is something to be judged under the Rule
10 of Reason?
11 MR. STREETER: Objection.
12 A It's a, you know, legal conclusion. But
13 I can think of lots situations where, clearly, from
14 an economic perspective would be that there was --
15 that there was some potential pro-competitive
16 justification or normal business reason I could
17 place.
18 Q Can you identify any pro-competitive
19 justifications for an agreement, assuming there was
20 one, among the tobacco companies, to restrict the
21 amount of research they did on their own?
22 A What do you mean, "on their own"?
0167
1 Q As opposed to research that was done by
2 outside laboratories or other people whom they might
3 have funded.
4 A But the point -- see, the economic
5 analysis there goes to the point of, is there --
6 are -- if there -- if there are very good substitutes
7 for what's arguably being restricted and -- availing
8 themselves of those substitutes, there's no economic
9 effect.
10 Q I understand that point.
11 But if -- if -- if you were to conclude
12 that there weren't good substitutes or that the
13 substitutes were not employed enough, you would then
14 get to the question of whether there was a
15 pro-competitive justification, wouldn't you?
16 A Well, you'd still look at a -- you'd
17 still look to effect. But you looked -- you'd look
18 into the purposes and the effects.
19 Q Right. I mean, you look at the effects.
20 You look both at anti-competitive effects and
21 pro-competitive effects, if you do a
22 Rule-of-Reason-type analysis; right?
0168
1 MR. STREETER: Objection.
2 A As an economist, I would say yes.
3 Q Okay. And my question to you, then, is:
4 Can you identify any pro-competitive effects from an
5 agreement, assuming there were one, among the tobacco
6 companies to restrict the amount of -- or -- amount
7 or type of research they did in-house?
8 A But I don't know that we'd ever get to
9 that point and -- in -- in an entrant. And, you
10 know, if you've got -- if you have alleged agreement
11 in which there's a perfect substitute and everyone's
12 availed themselves of the substitute, we'd never
13 even -- we wouldn't start the engine on, is this

14 something we'd need to worry about under the
15 antitrust law?

16 Q Well, you might not get to that point;
17 but I have. And my question for you is: Can you
18 identify any pro-competitive reason for such an
19 agreement in the tobacco industry?

20 A And in what, the alleged agreement that
21 there was a conspiracy not to do in-house biological
22 research on --

0169

1 Q Correct.

2 A -- intact animals?

3 Q Correct.

4 A No.

5 Q Did you ask anybody at any of the tobacco
6 companies whether there was a pro-competitive reason
7 for that?

8 A See, I concluded that the evidence was
9 inconsistent with there being an agreement and that
10 the -- and there was no effect, in any event.

11 Q I understand that.

12 Are you agreeing, then, that if the jury
13 winds up concluding that there was such an agreement,
14 that you're not going to a trial -- say, "Ah, but
15 there was an offsetting, pro-competitive benefit"?

16 A No. I -- my testimony is that, one, what
17 this research is about, what's required.

18 And one of the things that's required is
19 that third parties absolutely have to do the research
20 at some point or it's -- there would be no use.

21 And that outside research of this type --
22 it -- third-party contractors are typically the ones

0170

1 that are used in industry to do this sort of
2 research -- in most industries.

3 And that -- and that the defendants
4 clearly, at all times, were very active involved in
5 doing such research, sometimes within their own
6 facilities and always with the outside facilities.

7 So there -- if you look at what this
8 research was about, how could it affect anything,
9 what they did, the role of third party -- that there
10 isn't any -- there isn't any -- there -- there can't
11 be any anti-competitive effect flowing from this.

12 Q I understand that's your position.

13 And my question is: If anybody were to
14 disagree and say, "Oh, I think there are some
15 anti-competitive effects," you can't point to and
16 don't intend to point to any pro-competitive effects
17 that should be balanced against any anti-competitive
18 effects that somebody else concludes exists?

19 MR. STREETER: Objection.

20 A Well, I haven't really thought about
21 that. I don't have an opinion about that at all.

22 Q Okay. Now, you said you concluded that

0171

1 there was -- correct me -- did you state that you
2 concluded that there was no such agreement; and that
3 is, an agreement to restrict in-house biological
4 animal studies by the tobacco companies?

5 A Well, I can -- I can't usurp -- usurp the
6 role of the fact finder. So I hope I was more
7 careful than that.

8 I said that lots of the evidence is
9 contrary to that, that I report in my report, one,
10 what is the -- what's the anti-competitive purpose if
11 everyone's going to do it in a -- in a -- in a
12 different way than that, which might actually be a
13 more effective way of doing it -- well, what could
14 possibly be the anti-competitive purpose of it? How
15 could it affect output if it was a perfectly good
16 substitute doing it outside?

17 For every -- virtually everybody in the
18 industry at various times was doing what they
19 supposedly agreed that they weren't going to do, and
20 not just episodic like OPEC or, you know, in cases of
21 Liggett and other cases -- doing it for a very long
22 period of time.

0172

1 Q In your -- I'm sorry. I didn't mean to
2 cut you off.

3 A So there's just -- you know, when you
4 were talking before about the OPEC and everything --
5 you know, if everyone has learned in the Northwest
6 Laborers trial -- if everyone's cheating all the
7 time, it's kind of hard to -- for an economist to
8 argue that there's an effective conspiracy.

9 Q Now, you used the word "effective
10 conspiracy" there.

11 In essence -- you know, in your role as
12 an economist -- are you focusing upon -- I'm only
13 distinguishing between two things, and ask you if
14 you're focusing on one rather than the other.

15 The first is whether there was an
16 agreement; and the second, it would be whether, given
17 the agreement, there in fact was an economic
18 impact -- that is, was a successful the agreement was
19 successfully implemented.

20 Were you focusing on one of those to the
21 exclusion of the other?

22 A No.

0173

1 Q Okay. Let's go back to the first, then,
2 as to whether there was an agreement.

3 Have you seen documents that refer -- oh,
4 tobacco company documents, that refer to the
5 existence of such an agreement?

6 A In a general as sense, yes.

7 Q And do you -- did you disbelieve the
8 documents?

9 A Well, you know, I can't -- in fact, I --
10 I reviewed the documents. And I took those into
11 account.

12 But what I can bring to it as -- because
13 I don't have personal knowledge -- and, in fact, the
14 documents were usually written by someone that didn't
15 have personal knowledge of -- of when -- when this
16 alleged agreement began.

17 I can, as an economist -- with respect to
18 whether there was an agreement, I can use economic
19 and other logic and evidence to say, "Why would you
20 have such an agreement? It isn't economically
21 plausible."

22 And if you know -- if you know it's not

0174

1 economically plausible, if the parties are rational

2 and they understand it couldn't have an effect, why
3 would they have such an agreement?
4 That's the sort of economic logic and
5 facts you can bring to bear.

6 Q If, in fact, such an agreement would have
7 an effect, in view of the learned circumstances that
8 led you to believe -- "Oh, such an agreement really
9 could have an effect," then would that alter your
10 conclusion about whether or not a conspiracy -- such
11 a conspiracy existed?

12 A It would depend on what the effect was.

13 Q Let's assume you learned that such a
14 conspiracy could have the effect of limiting the
15 amount of information -- strike that.

16 Let's say that the effect of such a
17 conspiracy might be to reduce the likelihood that a
18 cigarette company would break ranks and admit that
19 cigarettes had substantial adverse health effects.

20 Let's assume --

21 MR. STREETER: Objection.

22 Q -- that the jury concludes -- and, you
0175

1 know, it's not for you or for me to usurp their
2 prerogative, so we're just going state it as a
3 hypothetical -- let's assume the jury concludes that
4 that would be the effect of this type of agreement.

5 Then, under those circumstances, could
6 you as an economist conclude that an agreement --
7 that such an agreement did not exist?

8 MR. STREETER: Objection.

9 A Well, the fact finders can determine
10 whether they think there was an agreement or not.

11 My -- what I can testify to and my
12 expertise is that, what the nature of this agreement
13 would be about and -- and the evidence that indicates
14 it was consistent or not consistent with it, and
15 what -- what possible effect it could have.

16 And I could talk and, if in that
17 particular case, if that's what the jury believed was
18 the effect of the conspiracy, I can speak and have
19 spoken in my report exactly as to what -- what would
20 be the -- what would have -- what would have been the
21 effect of that.

22 Q Um-hum. Now, in your report, you talk at
0176

1 various places about the impact or lack of impact,
2 certainly, health advertising would have had upon
3 American smokers; is that right?

4 A I talked both what the -- no. I talk
5 about what the nature of health advertising could
6 have been, given the realities of FTC regulation.

7 Q Okay.

8 A And what -- and what people rely on with
9 respect to health -- important health issues, like
10 cigarette.

11 Q Let's, you know, put aside for a second
12 the issue of what advertising was proper under FTC
13 regulation; and just focus upon the effect of
14 advertising, assuming it had occurred -- okay? --
15 taking issues one at a time.

16 Do you have a view regarding whether more
17 explicit advertising by the cigarette companies about
18 the adverse -- about cigarettes generally having

19 adverse health consequences would have had any impact
20 upon smoking prevalence?

21 A I'd have to -- I'd have to know what the
22 ad was. I don't know. I'd have to -- I don't know.

0177

1 Q Well, let me ask you whether it would be
2 possible to structure ads that would have such an
3 effect.

4 A That would have effects?

5 Q That would have -- would it be possible
6 to structure advertising in the tobacco industry,
7 over the period 1954 to the present, regarding the
8 health effects of smoking, that would have had a
9 substantial negative impact on the number people
10 smoking?

11 MR. WILLIAMS: Objection, vague.

12 MR. STREETER: Objection.

13 A That -- that's just too vague.

14 My conclusion is that there was an
15 overwhelming -- going back to the '50s, there was an
16 overwhelming amount of publicity. So the people were
17 confronted with -- we know that people in media --
18 you know, from survey information -- people formed
19 the leaks of harmful effects, going back well into
20 the '50s.

21 And it's hard to see what -- what
22 anything could have added to that.

0178

1 Q So you can't envision anything that could
2 have been said by the tobacco companies that would
3 have caused people to smoke less; is that your
4 position?

5 A It would have been just in addition to
6 overwhelming -- let's remember the situation here.

7 There was no -- for many, many years,
8 there were no explicit health advertising -- explicit
9 health advertising in the U.S., other than implicit
10 ones that were condoned by the Surgeon General and
11 the FTC.

12 That's -- that's not just true in the
13 U.S. That's true worldwide.

14 There was a overwhelming amount, going
15 back to the '50s, of media telling people there are
16 adverse health consequences.

17 We know -- we know from consumer surveys
18 going way far back that, already by the '50s, the
19 Surgeon General was -- very rate of belief by
20 consumers.

21 And we see what happened to prevalence.
22 We know that -- we know that a lot of people who did

0179

1 believe that it was a health problem choose to smoke
2 and continue to smoke.

3 So I don't -- no, I don't see any basis
4 from an historical record that it would have had any
5 substantial effect.

6 Q Okay. Let's move away from the word
7 "advertising," and just talk about the public
8 statements by tobacco companies.

9 Do you have a view regarding whether the
10 tobacco companies could have made any public
11 statements regarding the relationship between tobacco
12 and health that could have, to some significant

13 degree, decreased smoking in the United States --
14 MR. STREETER: Objection.
15 Q -- at any time between the period 1954
16 and present?
17 MR. STREETER: Objection.
18 A No, because -- well, I have studied that
19 in the report. We can do -- we can do various case
20 studies. We can look at what -- what has happened in
21 recent years, with various companies changing their
22 public position on smoking and health.
0180
1 So we have -- I've done -- tried to look
2 at this empirically. And in a number of ways, I've
3 looked at what people were exposed to.
4 I've looked, what happened in recent
5 years in the U.S. I've looked at what happened
6 historically in other countries, where the industry
7 and the government authorities took somewhat
8 different positions on this.
9 And it -- no, there's not -- there's not
10 any credible evidence that --
11 Q Okay.
12 A -- would have made any difference.
13 Q Now, between -- I'm sorry.
14 MR. STREETER: Were you finished?
15 Q If I ever cut you off, please indicate to
16 me -- sometimes it's a little hard to tell when the
17 question ends. But I'll -- I'll always back off and
18 let you finish.
19 A -- any difference in an empirical sense.
20 I'm not saying whether people would have
21 felt better, but for. That's not my inquiry.
22 I'm saying: Is there any evidence at all
0181
1 whether it would have significantly affected
2 prevalence, quit rates, start rates? And the answer
3 is no.
4 Q Now, between 1954 and 1964, about what --
5 could you quantify the decline in the -- in the
6 number of percentage of smokers?
7 A Well, prevalence fell 40 percent, if I'm
8 right, between '65 and '87. It's fallen further
9 since that time --
10 Q Okay.
11 A -- substantially.
12 Q Now, if in 1950 -- is it your position,
13 that, if in 1954 the six tobacco companies had come
14 out in response to the various animal studies and
15 said, "We've looked at the issue. And you know what,
16 the researchers are right. If you smoke cigarettes,
17 it will probably kill you" -- is it your position
18 that that would have had no substantial impact on
19 smoking prevalence?
20 MR. WILLIAMS: Objection, vague.
21 MR. STREETER: Objection.
22 A All right. You're mixing a couple of
0182
1 things here, which is: In 1954 nobody knew. Various
2 people had opinions. There was no -- there was no
3 basis of any scientific conclusion. That might
4 have -- be basis on "prudence" of saying, "You know,
5 according to cost benefit tests -- probably be a good
6 idea if you didn't do this."

7 Q Right now -- I'm sorry again. I --
8 please --
9 A There wouldn't be any basis for making
10 such a conclusion.
11 Q Whether or not there was a basis -- and
12 we might, of course, disagree as to whether there was
13 a basis -- let me ask you about different dates.
14 Is it your position that, if the tobacco
15 companies had come out in 1954 and said, "We've
16 looked at the evidence, and we have concluded that
17 smoking will probably kill you," that there would
18 have been no substantial impact, in the coming years,
19 on smoking prevalence?
20 MR. WILLIAMS: Objection.
21 MR. STREETER: I'm going to object
22 to the question.

0183

1 A That's much too complicated.
2 What -- what would they -- you know, if
3 they said, "And because of that, we decide we're not
4 going to sell cigarettes anymore," wouldn't -- might
5 that -- might that have had an effect?
6 Q Well, let's assume they continue
7 marketing everything. They say, "We know why we like
8 cigarettes and are willing to take the chance of
9 dying -- or are so addicted that you can't avoid
10 it -- you know, they -- you're going to buy --
11 cigarettes whether you like it or not -- but, yes, it
12 is true that if you continue to smoke it will
13 probably kill you?"

14 MR. STREETER: Objection.

15 Q Let's assume they made that statement in
16 1954.

17 Do you have an opinion regarding whether
18 there would have been any substantial impact in the
19 number of people smoking over the next several years?

20 MR. STREETER: Objection to form.

21 MR. WILLIAMS: Objection, vague.

22 A One thing that -- I mean, I -- I -- I

0184

1 have difficulty accepting the hypothetical, because
2 there wouldn't have been any basis at that point to
3 do that. Okay?

4 And that's why the public health
5 authorities were so -- were so cautious at that time,
6 because -- because it would cause tremendous turmoil
7 if the public health authorities conclude it. And
8 that's why in '64, finally, they formed a committee.

9 But I can only look at this -- I can look
10 at the evidence as an economist. And we can look
11 at -- the international evidence is important here.

12 We have -- in the U.S., among major
13 countries, the industry was, on average, more
14 aggressive on the health and smoking issue than most
15 of the -- the advanced countries in -- in putting
16 forward an industry position that causality wasn't
17 proved.

18 Now, if we look -- so we have some
19 qualitative -- we look, what happened in the U.S.
20 versus what happened in U.K., for example, where
21 the -- and other places in Europe -- where the
22 industry took a much more passive approach and just

0185

1 said, "Let -- let the scientific people, you know,
2 debate this. And we're going to -- we're going to
3 stay out of it," pretty much.

4 What you find there is no demonstrable
5 evidence. In fact, prevalence fell faster in the
6 U.S. than -- than most other places.

7 So at least -- when you look at the
8 actual evidence that's available and look at other
9 incidents in -- internationally -- and look at what
10 people were exposed to and what they believe, there
11 isn't any, you know, credible empirical evidence to
12 indicate that it would have -- that it would have
13 made a substantial difference.

14 It would have been a big story, just like
15 it's a big story today, just like the Brown &
16 Williamson documents being bleak, and Liggett, you
17 know, agreeing that cigarettes were addictive, and a
18 recent move by other companies of -- of not -- of not
19 challenging the causality conclusion.

20 It -- it -- it's a big story. But all
21 the empirical evidence is, it doesn't affect,
22 significantly, smoking behavior -- because in the

0186

1 end, people rely, as you'd expect -- they rely on the
2 medical experts and the government officials on what
3 the -- what the facts are.

4 Q Given all that, to go back to my
5 question: Is it your opinion that, if there had been
6 such a statement by the tobacco companies in 1954 --
7 that is, a statement that smoking would probably kill
8 people -- that there would -- is it your opinion that
9 there would not have been a substantial change in
10 smoking prevalence as a result --

11 MR. WILLIAMS: Objection.

12 A Substantial, long-term change --

13 Q Yes.

14 A -- in smoking?

15 No. The evidence is -- it would have
16 been a big story.

17 Q Okay. And --

18 A And it would have caused -- it would --
19 it would have -- it would have been notable. And it
20 would have been played up. But it wouldn't have had
21 any significant, long-term effect.

22 Q And would the same be true if, as opposed

0187

1 to saying, "Smoking will probably kill you," the
2 public statement had been, "We've concluded that, if
3 you smoke, your chances of getting lung cancer will
4 increase by 1000 percent"?

5 Would your -- would your answer be the
6 same as to the effect on smoking prevalence?

7 A Yeah.

8 Q Okay. And would your answer be the same
9 if they came out and said, "We concluded that
10 cigarettes are extremely addictive product. If you
11 start smoking, you may find it impossible to stop
12 smoking"?

13 MR. STREETER: Objection.

14 Q Is your answer the same; namely, that
15 that would not -- if those statements had been made
16 in 1954, then it would not have had a substantial,
17 long-term effect on the percentage of -- on smoking

18 prevalence?

19 A My opinion is --

20 MR. WILLIAMS: Same objection.

21 A -- on that matter, specifically, that
22 consumers, in terms of what was important for their

0188

1 own lives, absolutely knew that. They didn't have to
2 have anybody tell them. They knew, from their own
3 experience, their family members or acquaintances,
4 that that was true.

5 Q Did people who had not yet started
6 smoking all know that?

7 A They -- they -- they had parents or
8 familiar members or relatives or acquaintances that
9 they -- that they, on average, knew that that was
10 true.

11 Q Now, my questions have thus far related
12 to the year 1954. I'm going to jump ahead in time to
13 1964 -- and if it's possible to do this all in one
14 question, I'll do it; and if not, I'll break it out
15 into separate questions -- but would your answers to
16 the questions I just asked you be the same if I
17 substituted "1964" for "1954"?

18 MR. WILLIAMS: Well, the objections
19 would be the same.

20 MR. ANGLAND: I incorporate them by
21 reference. That only seems fair.

22 A You get more mounting empirical evidence
0189

1 over time that supports my conclusions. You get more
2 qualitative differences within the U.S. and when you
3 compare across countries.

4 When you get much more mounting evidence
5 that it didn't make -- that it wouldn't make any
6 difference. Not that it might not be a big story,
7 although at some point by the '70s it wasn't even a
8 big story -- when it happened, but -- necessarily --
9 but -- so the evidence gets stronger over time.

10 Q Okay. And again, in a way that may
11 shorten some of this.

12 Is it your position that there is
13 basically nothing the tobacco companies could have
14 said about the health consequences of smoking at any
15 time between 1954 and the present that would have had
16 a substantial effect in reducing smoking prevalence?

17 A Yes.

18 Q Okay.

19 A Because as -- by their actions -- you
20 know, we left out a whole part of this that you
21 didn't ask -- by their actions, you know, they
22 communicated what you're talking about to consumers.

0190

1 That's what the tar and filter derby was all about --
2 exactly about.

3 Q Did every smoker in the United States in
4 the year 1980 believe that smoking caused lung
5 cancer?

6 A No.

7 Q Were there even 10 percent of the smokers
8 in the United States in 1980 who had some skepticism
9 about whether smoking would have had -- substantially
10 increased their chance of lung cancer?

11 MR. STREETER: Objection.

12 A I don't remember the numbers, but it
13 wasn't just one person. There were -- there were --
14 Q So, if the tobacco companies themselves
15 came out and said, "You know what? We're sorry, but
16 it does" -- are you saying that it would have had no
17 impact?

18 Why would it not have had an impact upon
19 those people who, in fact, but for such a statement,
20 doubted that smoking caused lung cancer?

21 MR. TURKEN: Objection.

22 MR. WILLIAMS: Lacks foundation.

0191

1 A You're assuming the conclusion.

2 There were people in 1980 and people
3 today that still don't believe that. They don't
4 believe anyone on that, and maybe because they refuse
5 to believe or they may actually know the science and
6 they're purists.

7 And they say, "Well, it's statistical."
8 And more to the point -- you know, the problem in the
9 consumer surveys, what is really important is whether
10 people believe themselves. That's the critical
11 issue.

12 And it's not surprising that people who
13 have grown up in families with lots of smokers, and
14 no one ever got lung cancer -- some of those people
15 are going to believe they're not going to get it.

16 And in fact, it's true for a lot of
17 them -- because genetic -- and other environmental
18 predispositions are very important factors.

19 So there are lots of reasons why people
20 have the belief, and they hear opinions from all
21 sorts of people.

22 Q And is it your position that it would be
0192

1 impossible for the tobacco companies themselves, by
2 making statements against their own interests, in a
3 sense, by admitting their products were harmful, to
4 sway the opinions of any of these people, so as to
5 get them to believe that smoking was likely to cause
6 such bad effects?

7 A Well, I -- same thing. I've looked at
8 the evidence -- if you look at historical evidence in
9 the U.S. and you look at other countries, what has
10 happened, and what the industry -- and various
11 companies' approach they've taken.

12 And if we look at what's happened in
13 recent years, where the companies have taken a very
14 different position than what they have historically,
15 there is no evidence that it's affected anything and
16 it's affected the way people think about the
17 cigarette companies or what they believe about health
18 risks of smoking.

19 Q And does that apply also to people who
20 have not yet started smoking but are about to start?

21 A Well, this is -- it's an interesting
22 issue -- because if you actually track what's

0193

1 happened since the big events which began with the
2 release of the Brown & Williamson documents and all
3 that has happened since then, what we have seen in
4 the data -- and they're not related to one another --
5 we've seen the data and -- you know, child initiation

6 rates in the U.S. and in many -- in a number of other
7 countries -- seem to be going up.

8 I don't think they're causally related;
9 but it clearly hasn't reversed -- it hasn't had
10 that -- that's right, because everybody -- you know,
11 they believe what they believe, and they believe it
12 for a long time.

13 Q The decline in smoking prevalence since
14 1954, I believe earlier you said it was due, at least
15 in large part, to the increased information about the
16 adverse health effects of smoking; is that right?

17 A And demographic changes, yeah.

18 Q Okay. But a substantial portion was due
19 to information about the adverse effects of smoking;
20 is that right?

21 A I think a combination.

22 The most important things was information

0194

1 and people realizing that they were going to live a
2 lot longer than people thought they were going to
3 live back in the '40s and '50s. And so, they worry a
4 lot more about a disease that they might get several
5 decades in the future.

6 Q And during this period of time, as more
7 information was coming out regarding adverse effects
8 of smoking, tobacco companies would often argue that
9 the new evidence wasn't persuasive; is that right?

10 MR. STREETER: Objection.

11 A Yeah.

12 Q And is it your position that nobody's
13 view on the subject was influenced by the fact that
14 the tobacco companies said, "No, the evidence is not
15 persuasive"?

16 A Well, I don't know.

17 Was there any single person?

18 I think the tobacco company people,
19 largely, you know, believed that it wasn't
20 persuasive. I think that they spoke in general,
21 based on what -- probably what they believe.

22 And you'd say, "Well, why do you say

0195

1 that?"

2 One, that they had experts -- they had
3 experts that said, "No, it's not true. It's not
4 proven."

5 And two, unlike other industry
6 situations, they overwhelmingly walked the walk.
7 They were smokers. They -- I'm not surprised that
8 they believed, as some smokers believe, that it's
9 not -- for them it's not a risk.

10 Maybe it is for someone else.

11 (Discussion off the record.)

12 Q You talked about a 40 -- roughly, a 40
13 percent decrease in smoking prevalence over a certain
14 period of time, a few minutes ago.

15 Do you recall that?

16 A Yes.

17 Q Do you have -- did you do any
18 mathematical analysis that suggests that that
19 decrease would not have been, say, 50 percent or
20 higher if the evidence regarding the bad effects of
21 smoking had not been countered by claims of the
22 tobacco company that the evidence really wasn't

0196

1 credible and persuasive?

2 A Yeah.

3 MR. STREETER: Objection.

4 Q What was that mathematical analysis?

5 A Well, I see you've read my report. We've
6 done a lot of things. We've analyzed various
7 historical incidents to see whether they moved the
8 needle in that regard, and that a lot of those are
9 recent, in the U.S.

10 But some of them are historical in other
11 countries. And a lot of it is historical evidence of
12 comparing what has happened in the U.S. and
13 elsewhere.

14 And we've come to the basic fact, the
15 prevalence is, on average, lower than other countries
16 that are comparable. It's lower than other
17 countries, in which -- at various times have had less
18 aggressive public policy with respect to smoking and
19 health.

20 It would be -- it's totally speculation,
21 with total -- without foundation, given, if you look
22 at all the evidence to make such a conclusion, all

0197

1 the evidence points strongly the other direction.

2 You have to invent it to come to a
3 conclusion like that.

4 Q Now, in terms of statements by the
5 tobacco companies, in one form or another, that
6 smoking had adverse effects -- I think the example
7 you point to in your report is the release of certain
8 documents, the publication of certain documents in
9 1995; is that right?

10 A And Liggett, and what has happened since
11 with Philip Morris and Brown & Williamson and RJR.

12 Q Those were -- all of them were in the
13 1995-to-the-present period; is that right?

14 A Those were, yeah.

15 Q Okay. Do you have any basis for
16 concluding what, if any, the effect would have been
17 if those same statements had been made, not in 1995,
18 but in 1965?

19 A Yeah. I've told you: I've looked -- you
20 know, if you look across countries, you have a
21 qualitative -- you know about economics and you can
22 say, "Okay. If -- if you have a range of variables

0198

1 between here and here, it tells you something between
2 0 and .5, qualitatively."

3 It also tells you something about -- if
4 the range of variable was between 0 and 1.

5 As I've said, if you look across
6 countries, the -- behavior and a strategy of the
7 industry, tobacco industry -- different companies
8 markedly differ.

9 And, in fact, what actually happened
10 here, from looking at the evidence, is that the
11 position the industry took in the U.S. in the early
12 years made the government and scientific industry and
13 the media much more aggressive on smoking and health
14 than they were in countries where the industry took a
15 more passive view.

16 And in fact, what actually happened in

17 the U.S. -- there was much more controversy. You
18 have the 1957 hearings, the '64 Surgeon General's
19 report. You have all the hearings. You have
20 tremendous media.

21 It -- a significant part absolutely was
22 stimulated and exacerbated, from the industry's point
0199

1 of view, by the approach the industry took.

2 So if we look at other countries where
3 the industry sort of didn't really take a position,
4 as they did in the U.S., we see that, in fact,
5 prevalence fell faster here. Lots of things happened
6 faster.

7 And that's part of the competitive
8 process. In the competition for information, that's
9 what you'd expect.

10 Q Now, when you compare the United States
11 to other countries, with respect to smoking
12 prevalence there are a variety of factors that
13 influence the prevalence levels in the different
14 countries; isn't that right?

15 A Well, the major -- there are major
16 factors which are public policy, and cultural
17 factors, and to a lesser extent income levels and
18 price levels.

19 Q There's also a question about the extent
20 to which in that country health information has been
21 disseminated regarding the adverse effects of
22 cigarettes; isn't that right?

0200

1 A That can have an effect, yes.

2 Q There could also be differences regarding
3 how health conscious people in different countries
4 are; isn't that true?

5 A It can, yes.

6 Q There could also be a difference
7 regarding the longevity expectation in different
8 countries, consistent with what you said before about
9 the United States; isn't that right?

10 A Correct.

11 Q And there are scientific methods
12 available to try to test for the effects of these
13 different things, such as regression analysis; isn't
14 that right?

15 A No. I've done a scientific analysis --
16 but you're trying to -- to a regression analysis --
17 you're essentially scoring a lot of qualitative
18 evidence -- is very tricky to do rather than using
19 quantitative evidence.

20 I've done a scientific analysis. I've
21 taken into account all these factors -- it's really
22 very easy.

0201

1 Dr. Harris says, "but for" prevalence
2 would be at 3 percent.

3 Well, that -- there isn't any possible
4 support in the world for that. You cannot
5 possibly -- if you look at the rest of the world,
6 there is no possible scenario in the world.

7 If you ban cigarettes, prevalence
8 wouldn't be at 3 percent -- because of what you'd
9 have in bootleg and roll your own. We know that from
10 the European evidence. There is no possibility

11 whatsoever.
12 So we can see -- I've looked across a
13 range of countries, countries that are close in
14 income and demographic and cultural characteristics
15 to the U.S., countries with much more aggressive
16 public health policies with respect to advertising
17 and other sorts of things.

18 So we have all sorts of dimensions.
19 If you look at the U.S., if anything,
20 prevalence is lower in the U.S. There is simply no
21 basis in the data to support a conclusion that
22 prevalence would have been significantly different.

0202

1 Q In making what is, in essence, a
2 quantitative judgment like that, is it in your view
3 sound economic -- sound economics to proceed, not by
4 doing an equation, such as using regression analysis,
5 but instead looking at these factors and drawing a
6 judgment?

7 A Using sound analytical procedures, a
8 statistical analysis -- it is not a panacea. A
9 statistical analysis requires you to specify a model
10 and, when you have qualitative data, score the data.
11 That's really -- that's very sensitive to the result.

12 Now, you can have situations where it's
13 so obviously true, because of the range of variables
14 that affect -- and what you're comparing, like this
15 case -- and what's being proposed would have happened
16 "but for" -- that you can certainly, on comfortable
17 grounds, make such a conclusion.

18 That's a multi-variant analysis.
19 Economists can do multi-variant analysis, and they
20 don't have to put numbers in the machines and run
21 regressions. And many cases, that's really not
22 possible.

0203

1 Q So in other words, an equation is not
2 necessary, in your view, to reach a sound economic
3 opinion on this issue, even though that it, in a
4 sense, involves a quantitative answer?

5 A Yes.

6 Q And it would be fair for Dr. Harris to do
7 the same thing, wouldn't it?

8 A To do what?

9 Q To not necessarily use an equation if he
10 otherwise had sound analysis?

11 MR. STREETER: Objection.

12 MR. WILLIAMS: Objection.

13 MR. ANGLAND: I withdraw the
14 question.

15 Lunch break?

16 VIDEOGRAPHER: Off the record at
17 1:09.

18 (Whereupon, at 1:09 p.m., a lunch
19 recess was taken.)
20
21
22

0204

1 AFTERNOON SESSION

2 (1:59 p.m.)

3 VIDEOGRAPHER: We're back on the
4 record at 1:59.

5 MR. ANGLAND: Let's see, Counsel,
6 you had a comment to make.

7 MR. STREETER: Right. I just wanted
8 to say that I wanted to apologize for the confusion
9 earlier with respect to which cases we had a dispute
10 about compensation issues and which we don't.

11 With Heather's help, I've learned
12 that the defendants are hereby withdrawing their
13 direction not to answer with respect to all cases
14 except the Minnesota litigation.

15 So you're free to ask him about
16 compensation issues with respect to any issue -- any
17 case, except the Minnesota case.

18 MR. ANGLAND: Okay.

19 BY MR. ANGLAND:

20 Q Can you tell me, Dr. Scheffman, putting
21 aside the Minnesota case, what your total
22 compensation has been from the tobacco companies in
0205

1 connection with smoking/health-related litigation
2 work?

3 A So that I do the best I can to answer,
4 I've never actually -- I've never looked at that.

5 But I would guess it's something over
6 300,000.

7 Q Okay. And that excludes the Minnesota
8 case; is that right?

9 A Yes.

10 Q The -- the Minnesota case was the first
11 of the cases you worked on; is that right?

12 A Yes.

13 Q Can you estimate the amount of
14 compensation that LECG has received -- again, putting
15 aside the Minnesota case -- in connection with the
16 smoking/health-related litigations on which you have
17 worked?

18 A Not with any precision, but I suspect
19 it's something around \$1 million.

20 Q Okay. I have had the reporter premark as
21 Scheffman Exhibit No. 1, a document entitled "The
22 Report of Professor David T. Scheffman"; and it
0206

1 should be sitting over there in front of you,
2 Dr. Scheffman.

3 Would you identify that document for me?

4 A That's the -- that's the report I
5 submitted in connection with this matter.

6 Q Did you write the report yourself?

7 A Yeah, in a general sense. I -- I did the
8 last draft. The report, as you can tell, if you have
9 seen other reports, has -- incorporates in various
10 ways things from other reports.

11 Q Who did the drafts prior to the last
12 draft?

13 A It was a -- it was a group effort.

14 I have a couple people that work closely
15 with me on these cases, and we sort of looked at the
16 complaint in this matter. And we thought about what
17 we had in other reports that was relevant, and made a
18 decision of, you know, what -- what things might be
19 put together as a draft.

20 Q Did you receive comments from anybody on
21 your -- any drafts of your report?

22 A Outside LECG?
0207
1 Q Yes.
2 A Not that I recall.
3 Q Did you get drafts of your report to
4 counsel -- before you gave them your final report --
5 to counsel for the tobacco companies, before you gave
6 them the final report?
7 A Yes.
8 Q Okay. Did you receive any comments on
9 those draft reports from counsel?
10 A I don't recall any.
11 Q Okay. What is on my copy an un-numbered
12 page, but it includes paragraph 7 -- I think it's
13 probably page 2.
14 Did you find paragraph 7, Dr. Scheffman?
15 A Yes. Yes.
16 Q Okay. You mention that -- you state
17 there that you incorporate, by reference, certain
18 other expert reports and materials used in your trial
19 testimony.
20 Is there anything in those other
21 materials -- are there any conclusions, first of all,
22 in those other materials that you're including as a
0208
1 conclusion in this case, that you don't spell out
2 somewhere else in this hundred pages of -- of text?
3 A Well, I think I probably mention anything
4 as to my conclusions. It went out in this thing --
5 and some of my reports dealt very extensively with a
6 number of issues, which are just dealt with in
7 summary form here.
8 Q Okay. Which issues are those?
9 A I had done an extensive review of the
10 press releases of the TI and the TIRC in connection
11 with Minnesota litigation.
12 I had done an extensive review of the --
13 of the media, of what was in -- of what people were
14 exposed to in connection with the Minnesota
15 litigation.
16 I had done extensive research -- somewhat
17 in connection with Minnesota, and more in connection
18 with Northwest Laborers and Ohio matters on
19 international.
20 Evidence relating to other countries.
21 Things I -- those are the major things I
22 can remember right now.
0209
1 Q Okay. I asked you earlier today whether
2 certain types of agreements would constitute
3 anti-competitive agreements from the point of view of
4 an economist; and there's one I neglected -- one I
5 neglected to include.
6 Do you have a view regarding whether an
7 agreement among competitors that they will share the
8 results of any innovations that they reach in their
9 separate research could be anti-competitive?
10 A It's possible, but that -- that would --
11 that would definitely require a great deal of
12 elaboration of the issues.
13 Q Okay. A mechanism through which it might
14 be anti-competitive would be if the incentive of each
15 company to do the research was reduced because it

16 knew it didn't get to, if you will, monopolize the
17 results of the research; is that right?

18 A That's a -- that's one possible
19 theoretical conclusion.

20 The other is that they share the costs
21 and the benefits, and you actually get more. That's
22 why we see all sorts of joint venture and research

0210 consortium activity, actually.

2 Q Now, to be clear, I'm distinguishing the
3 agreement we talked about from a research consortium,
4 where people actually pool their efforts, integrate
5 in some way, and collectively do research.

6 Are -- so with that distinction in mind,
7 if you will, a naked agreement to share the results
8 of research on the one hand, which is what I'm
9 talking about, as opposed to joint research effort
10 where they get together in the same laboratory and
11 commonly fund an effort.

12 Are you aware of cases of the former --
13 that is, the sort of bare agreement to share the
14 results of their separate research -- that exists in
15 the U.S. industry today that you think is not
16 anti-competitive?

17 A Sure.

18 Again, it's quite common -- but I don't
19 know what you mean by "naked" -- it's quite common
20 for parties in joint ventures or R&D -- I mean,
21 not -- not R&D consortium.

22 I think there might be some joint

0211 activity; but there's an agreement that whatever each
2 party comes up with independently will be -- will be
3 shared.

4 Q Um-hum. Do you know if there have been
5 any antitrust challenges to such proposed agreements?

6 A I think there have been antitrust
7 challenges to almost everything. I just can't
8 remember -- I can't remember right now.

9 Q Fair enough.

10 Can you point to you any industries in
11 particular where that -- the type of agreement we
12 just talked about, namely where the companies agree
13 that they will just share with each other the results
14 of their separate research -- can you recall any
15 industries where that's going on now?

16 A It's very common in industries where
17 there's a lot of joint activity, cross-licensing --
18 other sorts of things -- to have as part of the
19 things that -- agreement to share -- what parties
20 might arguably come up with independently.

21 Q And can you point to any particular
22 industries?

0212 1 A Well, I -- yeah, lots of things in
2 Silicon Valley and telecommunication and things
3 have -- you know, it's a -- it's -- it's -- it's not
4 uncommon part of cross-licensing or other sort of
5 joint activities to have things, to have -- to have
6 such provisions.

7 Q Let's stick with Silicon Valley as the
8 first example you talked about.

9 What -- what situations are you aware of

10 where there is such an agreement; namely, an
11 agreement that anything one firm gets out of -- on
12 its own research commits that it will share with the
13 others?

14 A Well, it's -- I'm talking about --

15 Q And when I say Silicon Valley, I'm using
16 that in the generic sense. I don't care if the firm
17 is in California or not.

18 A Well, I don't know that I can speak --
19 because of confidentiality. I'll see if I can think
20 of a example.

21 You know, it's common -- if you have some
22 sort of technological -- technology-sharing

0213

1 agreements they -- because if -- cross-licensing,
2 licensing, and other sort of things.

3 You can have agreements that -- not share
4 mayrld, were members of
21 OPEC, were they?

22 A Correct.

0217

1 Q If you look at the bottom of page 11 of
2 your report, in particular paragraph 33 -- I just
3 have one small question.

4 Why don't you look at that paragraph
5 first. And that includes the carryover onto page 12.

6 A Yes.

7 Q On the bottom line of the text on page
8 33, you state, "Plaintiffs have not identified any
9 competitively significant piece of information that,
10 if disclosed, would have made any difference to
11 smokers' opinions on smoking and health or to the
12 state of scientific knowledge."

13 Did I read that correctly?

14 A Yes.

15 Q Can you explain what you meant by -- by
16 the word "competitively" in that context?

17 A Well -- some of these cases, like this
18 case, are both a combination of antitrust case and a
19 RICO case. So, competitively significant from the
20 point of view of antitrust.

21 But I think that -- and this may be
22 language I incorporated from a case that was a little

0218

1 more strictly, apparently, an antitrust case.

2 I would say that I could remove
3 "competitively" from this statement.

4 Q You preempted my question.

5 I just wanted to find out if you believe
6 the statement is true, even if the -- the modifier
7 "competitively" is removed from the statement.

8 A Well, I would -- yeah, I'd be -- well,
9 "competitively significant," actually -- you know,
10 I'd have to reword it a little bit more carefully,
11 because the word -- because "competitively," in some
12 sense, means "substantial."

13 I'm not saying that some particular
14 smokers' opinion could have changed in some "but for"
15 situation. I'm saying that any -- any significant
16 number of smokers' opinions would have been changed,
17 clearly.

18 Q From an economist's view, in a case
19 challenging a "per se" violation of the antitrust

20 laws, is it necessary to define the relevant markets?
21 MR. WILLIAMS: Objection.
22 A Well, that's a -- that's a legal
0219
1 conclusion. So, I don't --
2 Q When you make that statement in paragraph
3 37, then, on page 13, are you speaking beyond the
4 area of your expertise?
5 A You're talking about paragraph 37?
6 Q In paragraph 37, the sentence
7 beginning -- well, let me read it for the record.
8 You state in paragraph 37, "From an
9 economic perspective it would be necessary to define
10 a relevant market whether the antitrust allegations
11 in this are per se illegal or actually fall under the
12 Rule of Reason category..."
13 First of all, did I read that correctly?
14 A Yes.
15 Q And is that a statement that goes beyond
16 your area of expertise?
17 A No. I'm saying from an economic
18 perspective.
19 Q And in fact, my question to you used the
20 words "from an economic perspective," didn't it?
21 A Oh, well -- then I wasn't listening
22 carefully.
0220
1 Q Okay. Well, let's try it again.
2 From an economic perspective, is market
3 definition essential in a case alleging a "per se"
4 illegal conspiracy?
5 A I'd say it would be necessary for -- it
6 would be part of what would be required of an
7 economist, to add to the proceeding, as to bring what
8 an economist would have to bear on -- on whatever
9 economics would bring to bear on a conclusion of
10 whether or not there was a conspiracy or not.
11 Q Do you, based upon your work at the FTC,
12 including on conspiracy issues, have a view regarding
13 whether it is essential to define a relevant market
14 if one is pursuing a "per se" claim?
15 A I think it's as to what -- as to what the
16 law should entertain from a economists's expert
17 testimony, with respect to conspiracy -- the answer
18 is yes.
19 I don't see -- except in unusual
20 circumstances, I don't know why the court would be
21 interested in a document -- an economist reciting
22 documents and that being its analysis.
0221
1 That's -- a fact finder can determine
2 that, or an economist can analyze -- not that the
3 documents are relevant -- what the economist can
4 bring to the -- to a proceeding is economic analysis,
5 which start -- which -- which certainly starts with
6 economic definition of a market and -- and economic
7 characteristics of the market that suggest whether a
8 collusion could be as plausible, could be effective,
9 is rational, etc., and effects. That's what an
10 economist can bring to the proceeding.
11 Q There are several places throughout the
12 report -- throughout this report -- where you wind up
13 quoting some legal source; for example, what fraud --

14 fraud is or things of that nature.
15 And it's -- it's that -- that fact that
16 leads me to the question: Do you hold yourself out
17 as an expert on any area of the law involved in this
18 case?

19 A No.

20 Q Okay. In a Rule of Reason case, is -- is
21 it all always essential to define the relevant
22 market?

0222

1 A It is for a plaintiff.

2 Q Okay. You've worked over the years with
3 Jonathan Baker, haven't you?

4 A Um-hum.

5 Q In fact, he succeeded you in the position
6 of chief -- chief economist at the FTC; is that
7 right?

8 A Yes.

9 Q In fact, both -- I'm testing my
10 recollection here -- did both of you work in the area
11 of residual demand analysis once upon a time?

12 A That's correct.

13 Q Okay. In fact, you and he were among
14 the -- the first to do work in that area, as I
15 recall?

16 A Correct.

17 Q Okay. Are you familiar with the speeches
18 he has made on the *res ipsa loquitur* approach to
19 appraising anti-competitive conduct under the Rule of
20 Reason?

21 A Not recently. But, yeah, I -- I read
22 some of them at some time.

0223

1 Q Okay. And is it fair to characterize
2 Dr. Baker's position as being that market definition
3 is often used as a way to go about predicting whether
4 something has an adverse competitive effect, such as
5 an increase in price; but if you're able to measure
6 directly whether the agreement, in fact, has adverse
7 competitive effects, you don't have to go backwards
8 and define the relevant market? Is that a fair
9 characterization of his approach?

10 A Yeah. That's sort of what Jonathan's --
11 he could be characterized -- I don't know whether --
12 I don't know whether he and I would disagree that
13 residual market demand analysis really has embedded
14 in it market definition in a way to start.

15 And -- but it gives you the -- and if --
16 if the endpoint comes out a certain way, then -- then
17 you conclude that where you started was probably
18 right.

19 Q Well, in focusing upon his speeches and
20 work, particularly in the area of what he calls the
21 "*res ipsa loquitur*" approach, as opposed to his
22 earlier work, which explicitly dealt with residual

0224

1 demand analysis, do you agree with his conclusion
2 that if an economist, upon sound economic techniques,
3 can conclude that an agreement had an
4 anti-competitive effect, that it is not necessary to
5 go backwards and then define what the relevant market
6 is?

7 A Well, not necessary for what?

8 One, I think that -- that has that --
9 that analysis has embedded in it some very strong
10 conclusions of market definition.

11 Second, this isn't done in a vacuum. We
12 don't do this as a hobby. We do it because, in
13 litigation, the courts are interested in this; and
14 the courts have spoken very clearly, including on
15 Jonathan's theory, that -- you'd better define a
16 market -- you know, from looking at the fountain pen
17 case or various other cases like that.

18 So I don't think that that -- this was
19 sort of a -- you know, a religious argument. And I
20 think it comes down to -- I've reviewed the residual
21 demand analysis as sort of a very strong way of
22 establishing or disproving that a particular set of
0225

1 products or geography is a relevant market.

2 Q You mentioned, however, the courts have
3 come down on -- the United States Supreme Court, in
4 some cases brought by the FTC, concluded on the Rule
5 of Reason analysis market definition is not always
6 required?

7 A Okay. You're getting -- you're getting
8 too much into -- I vaguely -- I vaguely know what
9 you're talking about, I think -- but too vague to
10 give a sensible answer.

11 Q Fair enough.

12 Now, with respect to where the courts
13 have come down, you refer at various places in your
14 report, Scheffman Exhibit No. 1, to "innovation
15 markets"; is that correct?

16 A Yes.

17 Q That term -- was that term first coined
18 by the antitrust enforcement agencies in the course
19 of promulgating certain guidelines?

20 A I don't know whether "first," but that
21 was where it certainly became popularized.

22 Q Okay. Are you aware of any cases where a
0226

1 court has concluded that it should analyze the
2 antitrust issue by focusing upon an innovation market
3 rather than a product market?

4 A Well, I think a central issue in many
5 matters is -- and, particularly, Section 7 sort of
6 thing -- is what -- what would occur in the absence
7 of a merger -- not just in price, but what might come
8 into being, absent -- absent the merger.

9 And that's been a central -- way before
10 the innovation guidelines, that was a central issue
11 of the FTC and the anti -- antitrust division.

12 Q Now, I'm not asking about whether courts
13 ever look at the effects of a merger or some other
14 conduct on innovation.

15 My question is more specific, or at least
16 I'll try to make it more specific.

17 Are you aware of any cases in which a
18 court set about to define the relevant market and did
19 so by defining an innovation market?

20 A They didn't use that term.

21 But if -- for example, if you take the
22 catalytic converter case, if I remember right, one of
0227

1 the issues was, the thing you might say was a

2 catalytic converter market, but it -- given the thing
3 didn't exist yet, you were clearly talking about
4 things might exist in the future.

5 That was the concern.

6 Q But the focus there would be -- would be
7 the actual output of goods in the catalytic converter
8 market. That's what the focus was on, was it not?

9 A No. I think the focus was, what it --
10 what the "it" would be.

11 Q Okay.

12 A I didn't call it -- I think they define
13 the market. But it's -- you know, it's an odd --
14 it's an odd shoehorn, because if you define something
15 where you don't -- that doesn't even exist yet, you
16 don't know what it is.

17 Q Um-hum. Now, in the catalytic converter
18 case, are you referring back to the automobile joint
19 venture I talked about a moment ago, or a separate
20 litigation?

21 A Some -- one of the catalytic converter --
22 I don't know whether that was the only one or there

0228

1 was one you referred to -- I'm thinking about is a
2 California case. Is it not?

3 Q Okay. And are you referring to a
4 decision by a court or to a consent decree?

5 A Well, there was a decision -- there was a
6 decision of the court, at least as to standing in the
7 case, I remember.

8 Q Okay. Can you recall -- can you refer to
9 any court decision that resolved the issue of whether
10 a market should be determined or defined in terms of
11 an innovation market rather than a product market?

12 A I don't know that a court has ever used
13 that term.

14 Q Whether or not they've used the term, can
15 you ever -- can you recall any court decision where a
16 court has ever done so; that is, defined a market, in
17 effect, being an innovation market, even if it didn't
18 use the phrase "innovation market"?

19 A I think there are cases, certainly, in
20 which the concern of the court was that conduct might
21 change the nature of what the things are that are
22 produced in the future.

0229

1 And the court may have called it a thing
2 market, like catalytic converter.

3 But from an economic point of view, it
4 has to do with innovation. I wouldn't -- I wouldn't
5 use the term -- coin the term "innovation market" --
6 what -- what new things will come into being and how
7 might that be affected by the conduct at issue?

8 Q Can you recall any cases wherein a court,
9 in appraising the market power or absence of market
10 power of the companies involved, did so by focusing
11 upon their share of what would be defined by the
12 agencies, antitrust agencies, as an innovation
13 market -- as opposed to by looking at shares of the
14 product market?

15 A As to what a court has considered?

16 Q That's right.

17 A No; I you can't remember.

18 Q What percent of the -- of worldwide

19 cigarette production is accounted for by the
20 defendants in this lawsuit?
21 A Today?
22 Q Yeah.

0230
1 A I don't know the number.
2 Q Do you have any idea of the percentage
3 that the defendants in this lawsuit make up of the
4 total world?
5 A Yeah. I know -- I know that number. I
6 can't remember. And the numbers change significantly
7 over time. But -- and it's difficult to keep track,
8 because you have -- RJR's international share doesn't
9 exist anymore. It belongs to Japan Tobacco, and
10 things like that have happened.
11 So I can't -- I don't -- I don't know the
12 number off the top of my head. I know the number, and
13 I -- it's in one of my reports somewhere, actually.
14 But -- it could be calculated.
15 Q If you think it's in the document in
16 front of you -- you know, by all means refer to it.
17 A No. It's not -- it's not in here.
18 Q Okay. Do you know if, currently, more
19 than 50 percent -- pick a somewhat arbitrary
20 number -- of world cigarette production is accounted
21 for by the defendants in this litigation?
22 A No. No, I don't -- I don't know off the

0231
1 top of my head.
2 Q Do you know if more than 30 percent of
3 world cigarette production is accounted for by the
4 defendants in this litigation?
5 A Of the world --
6 Q -- cigarette production.
7 A In units?
8 Q Yes.
9 A No.
10 I -- I have looked at those numbers. But
11 I can't -- there are lots of -- there are lots of
12 complexities, one of which -- you know, China, Soviet
13 Union -- smoking consumption, where the defendants
14 are not substantial players yet. So I -- I don't
15 know the number off the top of my head.
16 Q Okay. Do you know -- to in the other
17 direction -- if more than 70 percent of the world
18 cigarette production is accounted for by the
19 defendants in this litigation?
20 A I don't -- I don't think so. But -- you
21 know, I mean -- I have -- I have research. I just
22 can't remember.

0232
1 Q Okay. Let's move back in time to, say,
2 1964, that we've used a lot.
3 Can you -- do you know or can you
4 estimate -- let me phrase it that way -- the
5 percentage of world cigarette production that was
6 accounted for by the U.S. tobacco industry?
7 And I'm going to include all of BAT when
8 I say "U.S. tobacco industry" in this series of
9 questions.
10 A Smaller, significantly smaller, probably.
11 But it's -- I'd have to go back and look at the
12 numbers on that.

13 But we had -- Philip Morris was not a
14 substantial international -- or none of the U.S.
15 companies were substantial international players.
16 BAT was the major international company
17 at that time, and not that big in the U.S.

18 So it's smaller than it is today, at
19 least for developed countries. I've got a factory
20 in -- you know, China and Asia and other places.

21 Q Do you know if, in 1964, the defendants
22 in this case -- and in any other companies that were

0233
1 then producing in the United States, to pick up any
2 small ones that were around -- accounted for 50
3 percent of world cigarette production?

4 A World cigarette production?
5 Probably not. That's guessing. I've
6 looked at the numbers; I just can't remember.

7 Q Okay. And if I removed China and Russia
8 from the analysis and asked you about the -- whether
9 the defendants in this case and any other U.S.
10 cigarette companies accounted for 50 percent or more
11 of the world's cigarette production, putting aside
12 production in Russia and China as of 1964, do you
13 know?

14 A I do; but I can't remember.
15 But it's probably -- it's probably known.
16 It's probable known, because you had major consuming
17 countries where BATCo -- where none of the U.S.
18 companies were not significant -- you know, Spain and
19 Germany and France, Japan.

20 Q In recent years, what percentage of world
21 tobacco research and development has been performed
22 by U.S. cigarette companies? And again, I'm

0234
1 including BAT in this.

2 A For the world?
3 MR. STREETER: Objection.

4 Q Yes.

5 A There aren't -- there aren't precise
6 numbers on that. We do know that there's some very
7 substantial players, like Japan Tobacco, who -- who
8 probably is on an equal footing, as best we could
9 tell from the assessments of the U.S. companies, in
10 terms of R&D efforts and their other -- the other --
11 their other companies in the world.

12 Q Given all that, can you -- do you have a
13 basis for estimating the percentage of world
14 tobacco-related research and development that is
15 performed by, in recent -- that has been performed in
16 recent years by the defendants in this case?

17 A I don't know whether -- if there are such
18 data, I have them. But I'm not sure there are -- I'm
19 not sure there are data like that available.

20 Q So you don't know?

21 A I -- I can't remember it today.

22 Q Is it your opinion that consumers weigh

0235
1 statements by third parties more importantly than
2 they do by -- statements of the makers of a product,
3 when it comes to statements about the quality -- when
4 we're talking about statements about the quality or
5 safety of the product?

6 A Yes.

7 Q Is that true even if the third party is
8 making a statement -- I'm sorry.

9 Is that true even if the maker of the
10 product is making a statement that its product is
11 unsafe, as opposed to being safe?

12 A Well, we don't have -- we'd have for look
13 at that on a case-by-case basis, because there aren't
14 very many -- there are very few examples like that.

15 Q And given -- I'm sorry. I didn't mean
16 to -- have you finished?

17 A And so, it really -- it really depends on
18 the context of the situation.

19 Q In other words, as you sit here today,
20 you can't say that consumers would necessarily give
21 less weight to an admission by a company that its
22 product was harmful in some way than it would to
0236

1 statements by independent third party that the
2 product was harmful?

3 MS. McDEVITT: Objection.

4 A No. I didn't say -- it really would
5 depend on the context.

6 People do not -- it's a very tricky
7 issue. And the problem is that there's not -- there
8 aren't a lot of case examples of that.

9 There are certainly -- there are some
10 good examples that approximate that in the cigarette
11 industry; but you really have to know the context,
12 because the -- the typical admission is -- that you
13 can think of in examples -- are -- are still -- you
14 know, depend on the form of the admission. They're
15 often still self-interested admissions.

16 Q I understand your point that it depends
17 upon the context. And all I was asking you was
18 whether, given that it depends upon the context, you
19 are capable of making a categorical statement that
20 when a party makes an admission regarding bad effects
21 of its product, that necessarily is given less
22 credence than if a third party made the statement?
0237

1 A Depends on the situation.

2 Q Okay. So in other words, you can't make
3 a general statement that covers all situations?

4 A Correct.

5 Q Okay. Let's take an example. Let's
6 assume some organization, like one of Ralph Nader's
7 organizations, says that a particular car is likely
8 to have its fuel tank burst into fire. Okay?

9 That's a third party, as you're using the
10 term, the Ralph Nader organization; right?

11 A (Witness nods head.)

12 Q You have to answer audibly.

13 A Yes.

14 Q And let's say that the particular
15 company -- call it "General Motors" -- whose car has
16 been so impugned, says, "No; that's misleading.
17 It's -- it's faulty data led to that conclusion. Our
18 car is not unsafe. It won't burst into fire."

19 In that scenario, is it your point that
20 the consumers will give more credence to Ralph Nader
21 as the third party than to General Motors, the
22 company that's -- who's self-interested in the car?
0238

1 A Well, it's not a blanket. It depends on
2 the credibility of Ralph Nader, or it depends -- it
3 depends on the credibility of whoever -- it's not
4 just that it's a third party.

5 It depends on -- you know, my statement
6 in the report is that credible third parties are
7 always the most important sources for -- the fact
8 that some third party, some crazy person -- I'm not
9 talking about Ralph Nader, but somebody else -- makes
10 some allegation doesn't mean they affect anyone's
11 opinion.

12 Q And I wasn't -- I guess I didn't mean to
13 convey that people would necessarily think Ralph
14 Nader was a -- was a crazy person or anything.

15 Let's say that Ralph Nader makes this
16 statement based upon some studies he got from MIT and
17 CalTech and the University of Illinois and New York
18 University.

19 And he looks at the data. And he and
20 some others conclude that, yeah, there's a real
21 likelihood -- in fact, it's probable -- that this gas
22 tank's going to burst into flame in inopportune

0239
1 situations.

2 Let's take that as our hypothetical.
3 Okay?

4 A Okay.

5 Q In that situation, is the consumer more
6 likely to credit Ralph -- the claim by the third
7 party -- or third parties, if you want to think of
8 each of the universities as a party -- or are they
9 more likely to credit the claim by the automobile
10 company that, in fact, there is no safety hazard?

11 MR. TURKEN: Objection.

12 A It depends completely on the context.

13 Q So sometimes they would -- if it depends
14 upon the context, then in some cases they would give
15 more weight to the automobile company than to the
16 third party, by definition; isn't that right?

17 A I think it's --

18 MR. STREETER: Objection.

19 A -- more whether they -- whether they --
20 you know, what they pay attention to.

21 It may not be -- it's more complicated.
22 It may not have nothing to do with the company --

0240
1 says at all.

2 It may have to do with whether the people
3 are interested in the information.

4 We know from auto recalls and lots of
5 things that for most of those things people weren't
6 very interested in no matter who says -- whether the
7 company says it, whether NITSA says it, whether Ralph
8 Nader says it.

9 Q Okay. Let's limit ourselves to people
10 who are interested in the issue and want to make a
11 reasonable judgment about the danger or lack of
12 danger involved.

13 For those people, are there cases where
14 the people would believe the automobile company more
15 than the third party?

16 A That's -- that's just too vague.

17 I mean, it's really too vague a -- you

18 can't take it in the absence of a context and what is
19 actually -- you know, what is actually, quote, the
20 facts or truth that there is such a thing and -- and
21 what -- and what else people are exposed to.

22 Q Well, in that case, it follows, doesn't

0241

1 it, that it is not always true that they will believe
2 the third party more than the company whose product
3 has been challenged, if it does depend upon the
4 circumstances?

5 A Correct.

6 Q Okay. In that example, what if the
7 automobile company had come out and said, "By God,
8 Ralph Nader's right. Our car does burst into flames.
9 Sorry. We misdesigned it" -- would that sort of
10 statement be credible to a large number of people who
11 are interested in the issue?

12 MR. STREETER: Objection.

13 A It -- it would depend on the -- it would
14 depend on the situation, so that you're -- you're --
15 I don't understand.

16 There -- in -- in -- in history, there
17 are extremely few, if any, circumstances where anyone
18 has ever done that, even where they've -- not that
19 they haven't indicated in some way there might be
20 some problem with their product.

21 But it's usually communicated in a way
22 that's a little bit, from their point of view, more

0242

1 even-handed than that.

2 Q And what I'm asking --

3 A It depends on how it's communicated.

4 Q I'm sorry. I do -- let me state for the
5 record, sometimes -- we are sitting across -- and
6 this is our fault -- a very wide table. And I don't
7 have as good a visual cue.

8 When the witness is continuing to talk, I
9 literally can't see your mouth moving at times; and I
10 do apologize whenever I've interrupted you --
11 probably a half-dozen times.

12 I also shut up quickly when I see you're
13 continuing. But let me, for the record, make -- make
14 that clear.

15 I don't recall if you recall where you
16 were; but if you want to hear the -- hear your answer
17 back or continue, please go ahead?

18 A I'm saying, the problem with all these
19 questions -- from this morning and all this -- you're
20 taking a hypothetical which is -- almost impossible
21 to find in human history -- that a -- that a company
22 would just nakedly say, "Our product's terrible.

0243

1 Here is -- here's the truth. No -- no rhetoric in
2 connection with it" -- just because that sort of
3 situation -- sort of, that might be the thing just
4 before you pull the plug.

5 I mean, I don't -- we don't -- there
6 aren't -- you would never -- you'd never expect to
7 see that -- to happen in any industry. So...

8 Q And given the absence of such data, you
9 really don't have much to look at to predict what the
10 effects of such a statement would be; isn't that
11 right?

12 A No. No. But it depends on the context.
13 You know, I'm saying: In the cigarette
14 industry, we have a lot of evidence -- because we
15 have a lot of history. We have a lot of history. We
16 don't have exactly your hypothetical; but we have a
17 lot of things that bear exactly on that, beginning in
18 the U.S. with the Frank statement, which on its face
19 was an admission of sort -- which really was
20 remarkable -- admission, saying, "There's people out
21 there that are really credible, scientific people.
22 And this say there's this problem. We are not -- we
0244

1 don't think they're right, but we're looking into
2 it."

3 That was an amazing admission in 1954.
4 And -- and if we look at -- look at all the other
5 evidence that I talked about this morning, about what
6 the effect of various sorts of admissions might be --
7 hypothetical admissions might be -- I think it's
8 quite clear and that the answer is in the cigarette
9 industry, given the long history and the context and
10 whatever else -- what -- all the things people were
11 exposed to.

12 MR. ANGLAND: We need to change the
13 tape?

14 VIDEOGRAPHER: Off the record at
15 2:43. End of Tape No. 2.

16 (A recess was taken.)

17 VIDEOGRAPHER: Back on the record at
18 2:46. Beginning of Tape No. 3.

19 BY MR. ANGLAND:

20 Q Dr. Scheffman, you indicate that various
21 studies have shown that, historically, U.S. consumer
22 awareness of the risks of smoking have been

0245
1 relatively high; is that right?
2 A Yes.

3 Q Let's assume for a moment that a survey
4 of smokers indicated that they believed that 2
5 percent of smokers would wind up dying from a
6 particular, disease -- but, in fact, the real number
7 is 4 percent.

8 Would you view that as a fairly accurate
9 appraisal on their part, of the risks of smoking?

10 MR. STREETER: Objection.

11 A No. I think the problem -- I'm familiar
12 with these sort of surveys. And there are surveys.
13 The surveys pretty clearly indicate that people
14 probable overestimate the health risks of smoking, in
15 general.

16 Now, if you try and unbundle -- you know,
17 and you ask: But do you know how -- what's your
18 likelihood of lung cancer and other sorts of
19 things -- then you get a mix.

20 Then you get a mixture -- not
21 surprisingly, because it's a -- it's complex issues.
22 And people are mostly concerned about whether they're

0246
1 going to -- life is going to be short, and not
2 whether it's going to be due to emphysema or lung
3 cancer or heart disease.

4 So we always find, when we unbundle those
5 things for consumers, that we get -- we get

6 evidence -- we get impressions which are, quote, less
7 accurate, maybe, than they're -- what the real
8 threshold issue is.

9 Q What metric, what quantitative measure
10 would you use to judge whether consumers accurately
11 perceive the risks of smoking?

12 What would you compare to what?

13 A Well, I've looked -- I've cited the
14 literature here. And I've cited, in particular,
15 Professor Viscusi's research -- various ways measures
16 what people's opinions are, and contrast that with
17 what the -- what the objective evidence would
18 indicate what the real -- what the real risks are.

19 Q And I'm asking what measure, whether it's
20 one that Professor Viscusi used or one that you think
21 is appropriate -- what measure, what would you
22 actually compare, in terms of what people perceive

0247

1 and what really existed, to find out whether people
2 correctly estimated, overestimated, or underestimated
3 the risks of smoking?

4 A Perceived risk versus actual risk.

5 Q How would you measure risk in each case?

6 A Well, I don't remember the -- I -- I
7 don't remember the details of the -- today --
8 about -- for example, what some of this literature
9 does, like Professor Viscusi and the other literature
10 I cite. So I just -- I can't from memory remember.

11 I've reviewed those -- I've reviewed the
12 research, and -- you know, because I cite it -- and I
13 believe that it was appropriate methodology. And the
14 results didn't -- the results were -- were a proper
15 basis of making a conclusion.

16 Q What in your opinion would be a proper
17 way of measuring that risk, whether or not you recall
18 exactly how Professor Viscusi did it?

19 A That's a -- that's a complicated issue.
20 I really -- I'd really have to think about it. I
21 can't do it from memory.

22 Q Is it an issue you've ever analyzed?

0248

1 A Yes.

2 Q In the context of smoking?

3 A Yes.

4 Q But as you sit here today, you can't
5 recall what you concluded?

6 A Well, I don't -- I'm sorry. I'm not
7 being clear.

8 I haven't done such a study. I've looked
9 at the published literature, and I've -- I've looked
10 at the methodology and the data used in those cases,
11 and thought about, does that seem reasonable to me as
12 a procedure. And I concluded that it was.

13 But I can't remember today.

14 Q Do some of the studies -- first of all,
15 are you familiar with the term "relative risk" --

16 A Yes.

17 Q -- as it's applied in the smoking/health
18 context?

19 A I don't -- you know, I don't -- I
20 couldn't do much of a memory test on it today.

21 You know, I'm familiar with that term.

22 Q Do you recall that it relates basically

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1 to the risk, however measured, that a smoker would
2 have from a particular disease, divided by the risk
3 that a nonsmoker would have to a particular disease?

4 MR. STREETER: Objection.

5 A Well, that's -- you're getting -- I don't
6 remember with enough specificity to remember that.

7 I remember -- I remember the term. I
8 just don't remember today.

9 Q All right. Do you think it is reasonable
10 to compare -- when judging whether people accurately
11 perceive the risk of smoking, do you think it's
12 reasonable to use relative risk as a measure of risk?

13 A I just -- you're asking me things that I
14 just can't from memory adequately answer today.

15 Q Well, rather than doing it from memory,
16 can you figure it out as we sit here?

17 A No, probably not, not in the time we
18 have.

19 Q What would you need to be able to figure
20 this out?

21 A Okay. I'd -- I -- I told you, I -- I
22 have not done this research.

0250

1 I relied on published research that I
2 have reviewed on the subject, and I'm familiar with.
3 I've certainly read it and cited it, but I can't -- I
4 can't do a memory test on that today.

5 Q I'm not asking you how the numbers came
6 out. I'm just asking you whether you think it is
7 reasonable for an expert trying to figure out whether
8 people correctly perceive the risks of smoking -- or,
9 more accurately, to figure out how close to correctly
10 they perceive the risks of smoking -- whether it is
11 appropriate to use as a risk, measure of risk, the
12 relative risk; that is, the ratio of the risk to the
13 smoker to the risk to the nonsmoker.

14 MR. STREETER: Objection.

15 A I couldn't answer that today.

16 Q And if you were to read as -- an article
17 by somebody today that used that particular method,
18 the relative risk method, to compare the real versus
19 the perceived risk of smoking -- when you got to that
20 point in the article, would you just say, "Gee, I
21 have no idea whether this is reasonable or not," and
22 skip over it, or what would you do?

0251

1 MR. STREETER: Objection.

2 A For what purpose?

3 Q To -- to appraise whether this was a
4 meaningful, reasonable study.

5 A I would -- I would go back -- I'd have to
6 go back, and refresh my recollection of the knowledge
7 of the literature and what the -- what I think the
8 appropriate techniques are, and come to a conclusion.

9 I just can't do that today.

10 Q How much time did you spend reading
11 studies by Professor Viscusi and others that dealt
12 with this issue, the issue being -- now, the general
13 issue of perceived versus actual risk from the point
14 of view of smokers?

15 A I don't -- I don't know. I think I
16 spent -- you know, I've read the Viscusi book and

17 articles. I've read a number of other articles that
18 bear on smokers' perceptions of risks.

19 Q Have you spent ten hours doing this?

20 A Oh, easily, yeah.

21 Q 50 hours?

22 A I don't know.

0252

1 Q Okay. And I take it, then, just to be
2 clear, that given that reading that you've done and
3 the thinking you've done, as you sit here today you
4 have know opinion, one way or the other, on whether
5 using the relative risk to do that sort of comparison
6 between real and perceived risk would be an
7 appropriate thing to do?

8 MR. STREETER: Objection.

9 A No. I'd say I'm -- I'm -- I'm sure I
10 have an opinion. But I can't tell you what it is
11 because I can't remember. I haven't offered an
12 opinion on that.

13 Q Well, but my question was as you sit here
14 today.

15 A No. I can't -- I don't -- I can't offer
16 you an opinion today.

17 Q Did you have an opinion when you wrote
18 this paper, as to whether -- whether relative risk
19 would be an appropriate measure of risk?

20 A I can't tell you more than -- I -- I
21 cited the literature that -- that -- that I thought
22 was useful in shedding light on the risks smokers

0253

1 perceive.

2 Q When you were reading the Viscusi
3 materials and the other materials dealing with this
4 issue, do you recall pausing to ask yourself whether
5 risk was being measured in the proper way?

6 A Of course, yeah.

7 Q Okay. But you just can't recall anything
8 that -- about that thought process you went through?

9 A Well, that's -- well, that's -- I mean,
10 that's not a fair question at all.

11 You're asking me about a specific term,
12 and I can't remember which articles used that sort of
13 measure.

14 I don't know where -- I've read a lot of
15 things. There's FTC reports on consumer perceptions.
16 There's a lot of -- there's a lot of articles by
17 medical people about -- that try to look at
18 perceptions. There's articles by Viscusi and others
19 that I've cited.

20 I've read a lot of that literature.

21 Q And having read it, as you sit here
22 today, though, you can't give me -- tell me yes or

0254

1 no, as to any of these measures of risk, whether they
2 would be an appropriate measure of risk to use in
3 that type of study; is that correct?

4 A I'd have to -- I'd have to refresh my
5 recollection.

6 Q Which I assume means that it's correct
7 that, as you sit here today, you can't do it.

8 A Correct.

9 Q Okay. Now, this morning you mentioned
10 having looked at what happened in the aftermath of

11 the release of certain Brown & Williamson documents
12 in 1995. Do you recall that?
13 A Yes.
14 Q Okay. And that if I recall correctly,
15 your point was that you looked at smoking prevalence
16 in the aftermath of the release of Brown & Williamson
17 documents, and you didn't see that that release had
18 any substantial effect on smoking prevalence; is that
19 right?
20 A Prevalence or initiation or quit rates,
21 from what we -- the best we can tell from the data.
22 Q Okay. Now, in doing that analysis did

0255

1 you do any empirical work?
2 And by "empirical," I mean actually, for
3 example, do aggression analysis or something, as
4 opposed to simply looking at empirical data, such as
5 prevalence rates.
6 A I don't recall, for sure.
7 It wouldn't have been much help, because
8 there's essentially one data series. I don't know.
9 I think, as best I can recall today, it
10 was just looking at the data series; and it showed
11 that there was no -- there was no significant
12 downward impact on prevalence or initiation, or an
13 upward impact on quit rates.

14 Q You're familiar with the term event
15 study, aren't you?

16 A Yes.

17 Q And -- yeah -- for the record, why don't
18 you describe what an event study is.

19 A Well, an event study is used for stock
20 market data, to analyze whether there -- whether
21 there seemed to be a measurable effect on the stock
22 price of a company or an industry or a group of

0256

1 companies.

2 Q Isn't the same type of mathematical
3 approach used, other than in the context of stock
4 market price data?

5 A Not usually, because in the stock market
6 the -- the theory of the stock market is that --
7 finance theory indicates that certain things, in
8 theory, would be instantaneously virtually
9 incorporated into the stock price. And so you get a
10 precise effect.

11 Most actual things in -- that happen in
12 real markets take time, you know, rather than
13 instantaneous effect.

14 Q And in the case of tobacco-related
15 issues, at least for existing smokers the fact that
16 there is an addiction or habituation caused by
17 tobacco can cause the effects to be even more lagged
18 than they would be in other circumstances; is that
19 right?

20 MR. STREETER: Objection.

21 A Well, we're looking at initiation and
22 quit rates and other sorts of things.

0257

1 No. You -- well, I don't -- I don't -- I
2 was never expecting to see an effect the day after
3 the release of the documents.

4 What's really striking is that no one

5 claims -- in fact, the health-care community claims
6 the opposite -- that things are, in fact, going the
7 other direction. That has nothing -- doesn't have
8 anything to do with the release of the documents.

9 But there's no sign at all in any --
10 when -- anyone that looks at the numbers that -- and
11 the trends, from a health -- from the point of view
12 of public policy have been improved in any dimension.

13 Q When you looked at those prevalence data
14 to see if there was an impact of the Brown &
15 Williamson disclosure, did you look by -- just at
16 aggregate data, or did you break it down by age and
17 gender?

18 A Well, we've looked at the -- the
19 available data. Certainly looked at initiation.

20 What we know by initiation -- where the
21 trends are -- in the U.S. and lots of other places in
22 recent years have been going the other direction.

0258

1 So I remember looking at that, and
2 looking at -- you know, I mean, initiation by
3 smoking -- smoking rates, as they're measured in
4 various ways, by underage -- by children.

5 Q Which sources of data were you looking at
6 to ascertain children's initiation rates?

7 A Well, I can't -- the -- the -- one of
8 the -- one of the public health organizations in the
9 U.S. I can't -- let me think.

10 I know which one, but I can't remember
11 off the top of my head -- collects -- you know,
12 reports data on that. And other countries have
13 similar agencies that try to estimate that.

14 Q Um-hum. Did you consider doing any
15 econometric study to test whether the release of the
16 Brown & Williamson documents in 1995 had an effect on
17 smoking prevalence?

18 A I can't -- I -- I can't remember.

19 Nothing other than something very
20 simplistically -- simplistically -- but just
21 statistical analysis, showing what you could see in
22 the data.

0259

1 There wasn't any wiggle, since 1985, that
2 I find in the data.

3 Q Well, just looking at the data itself --
4 or themselves, I should say -- wouldn't shed light on
5 whether there were confounding factors that might be
6 masking, in effect, the disclosure of the Brown &
7 Williamson documents, would it?

8 A I thought about confounding effects; but
9 it's hard to -- it's hard to see what they would be
10 in this particular case.

11 There's not -- there wasn't -- there
12 clearly wasn't a reduction in tax rates. And in
13 fact, prices have gone up.

14 Lots of -- lots of things, if anything,
15 have gone the other way. And the adverse publicity
16 has -- increased.

17 You know, the point is: This isn't --
18 plaintiffs claim there would be some really dramatic
19 effects from this sort of activity.

20 Q Correct.

21 A Not that it would be -- have some

22 statistically significant but, you know, immeasurably
0260

1 small effect -- that it would have a dramatic effect.
2 That's the whole plaintiffs' theory here.
3 And there's just not -- looking at that and a number
4 of other examples, there is just not any support in
5 the data for that.

6 Q Um-hum. And when you looked at the --
7 the data to try to figure out whether there was a
8 change, what data points did you compare?

9 And I'm -- when I say "what data points,"
10 I'm -- I'm talking about what year or what time
11 period did you compare to what time period?

12 A Well, I'll say it again: I did lots
13 of -- are you talking about just Brown & Williamson?

14 Q Yes.

15 A So if we look at the period since the
16 release of the documents, we have the release of
17 documents and then a number of other things have
18 occurred.

19 A lot more publicity about the documents,
20 the AG's case, the MSA, Liggett -- Liggett's settling
21 out, making certain admissions, the other
22 companies -- the other companies changing their

0261
1 position on health -- a lot of dramatic things have
2 happened.

3 From the plaintiffs' perspective, they're
4 really all the dramatic things that have happened
5 that the plaintiffs say was -- would have been really
6 important.

7 And if we -- that's what the whole
8 climate has been since the release of the documents.

9 And no one in the public health community
10 is finding any evidence that things are -- from their
11 point of view, are improving, in terms of smoking
12 incidence.

13 Q So there's -- there's no decrease in the
14 initiation rate of smoking since the release of the
15 Brown & Williamson documents; is that correct?

16 A There's no measurable -- the only thing
17 where we begin to see some measurable effect is, the
18 substantial price increases that arose in connection
19 with the MSA are clearly having a dramatic effect on
20 per capita consumption.

21 We don't know yet whether that is having
22 a significant effect on prevalence. It's not clear

0262
1 that it's actually having an effect initiation rate.
2 So we think there are trends that children's
3 smoking's actually going up.

4 Q Um-hum.

5 A So -- there has been a dramatic effect on
6 per capita consumption because of the price.

7 Q Okay. Companies compete -- and I'm not
8 talking about tobacco industry in particular here,
9 just in general -- companies can compete on grounds
10 other than price; is that correct?

11 A Yes.

12 Q Product quality would be one --
13 dimension; is that correct?

14 A Yes.

15 Q And although you might include it in

16 product quality -- different attributes of otherwise
17 competitive products, differentiation of products, is
18 another ground on which they can compete?

19 A Yes.

20 Q Okay. Is it possible for an industry to
21 be competitive with respect to one dimension of
22 competition, but to be uncompetitive or

0263

1 non-competitive with respect to another dimension of
2 competition?

3 A Well, yeah, "uncompetitive" is a --
4 that's kind of a loaded word -- there's certainly, in
5 most industries -- we hope we teach in business
6 school -- is that, you know, in most industries
7 there's one -- there's a particular emphasis on one
8 form of competition. It might be price. It might be
9 new product development. It might be advertising.

10 So in that sense, in most industry
11 situations, some of the competitive -- some of the
12 particular competitive are more important than
13 others.

14 Q Well, in theory, isn't it possible for an
15 industry to agree that they will not compete on
16 price -- it may be illegal -- but they would agree to
17 not compete on price, but remain free to compete in
18 advertising or differentiating products in other
19 ways?

20 A Yes.

21 Q Wouldn't that be possible?

22 A Yes.

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1 Q So you could have an industry that was
2 competitive with respect to one dimension of
3 competition, but non-competitive with respect to
4 another dimension of competition?

5 A -- particularly, in an antitrust -- you
6 have a price-fixing cartel with no -- no agreements
7 on any dimension -- other dimensions -- yeah, sure.

8 Q Okay. And it could work the other way
9 around, where you could have competition with respect
10 to price, but agree -- but a restriction of
11 competition and uncompetitive conduct with respect to
12 certain other industry characteristics.

13 That's possible too, isn't it?

14 A That's possible. But depending on the
15 situation, it begins to test the plausibility --
16 because nothing is more worse for a -- for an
17 industry and company than to have, competitive on
18 price.

19 So if you were going to go to the bother
20 to conspire on something, that's where you should
21 always begin.

22 Q Um-hum. I suppose an industry could

0265

1 conclude that there was a greater risk of antitrust
2 sanctions or being caught in one type of conspiracy
3 than another. That's a possibility, too, isn't it?

4 A Possible.

5 Q Okay. You refer to a -- a treatise by
6 Fiske & Hartley in your report. Do you view that as
7 an authoritative source in the area of advertising?

8 A Can you point me to the paragraph?

9 Q On page 56 -- where, to be exact, you say

10 that the Kotler text -- text cites a treatise by
11 Fiske & Hartley as identifying certain factors that
12 influence the effectiveness of advertising.
13 And then you either list or quote them --
14 I'm not sure which -- over the next page.
15 A I think that these -- these general
16 conclusions here are basically supporting by --
17 supported by marketing professionals, yeah.
18 Q Okay. And in particular, then, do you
19 view the Fiske & Hartley text -- book, I should
20 say -- as an authoritative source in the area of
21 advertising?

22 A Well, "authoritative" is a little -- I --
0266

1 I -- I cite them for this because I think it was a
2 citation from the literature that I think is widely
3 shared by marketing professionals.
4 That's all -- I don't remember -- I
5 can't -- I can't speak more broadly about Fiske &
6 Hartley. I mean, it's a cited -- it's a -- I
7 don't -- you went before, is it bogus? Is it -- I
8 forget -- this before.
9 It is a book cited by the leading
10 marketing text. I've cited it. So it's certainly --
11 it's a -- but, yeah, is it a professional -- is it a
12 professionally done piece of work? Yes.

13 Q It's something you feel comfortable
14 citing?

15 A For this purpose, yeah.

16 Q Okay. Are there purposes for which you
17 won't feel comfortable citing it, that you know of?

18 A Well, I -- as I said, we -- we -- there
19 might -- there may be something in the -- in the --
20 in the book that I would disagree with that I think
21 didn't -- it didn't comport with what -- what we know
22 in marketing science about some issue.

0267

1 Q Okay. Now, you state in your report that
2 the purpose of biological research on cigarettes is
3 to test the product. Do you recall that?

4 A Yes.

5 Q How did you find that out?

6 A Through doing a lot of research on -- on
7 what -- in what the testing was for, what it was used
8 for. I cite the surgeon general's report.

9 Q And when you talk about testing the
10 product, are you simply referring to the final
11 version of a product or are you talking about, for
12 example, prototypes as well?

13 A Prototypes as well.

14 Q Okay. On page 75 of your report,
15 paragraph 200, you say that the tobacco companies
16 have engaged in "very substantial research."

17 Do you see that?

18 A Yes.

19 Q How did you make the judgment that the
20 quantity of research they engaged in was very
21 substantial?

22 A Well, I -- I tried as best I could to

0268

1 document it.

2 In one of the cases, I had a very
3 extensive bibliography that cited public source and

4 company documents about all the sorts of research
5 they were involved in.

6 And we have the interrogatories provided
7 by the companies in connection with various
8 litigation, and also what I know about -- what the
9 product -- what the outcome has been of the research.

10 Q I understand that you gather together
11 information from various sources to indicate what
12 type of research and how much research had been done.

13 And what -- my question really is: After
14 getting that information, what led you to conclude
15 that it would be fair to characterize it as "very
16 substantial"?

17 A Because I've analyzed the R&D activities
18 of lots of companies. There's -- there's -- there
19 has been, for a long time, a lot going on. And --
20 and -- and I've documented as best I can, then --
21 could do -- all the things that were going on.

22 But as I've -- and I've said in this

0269

1 report and testified elsewhere -- it is difficult to
2 find a consumable product that has so dramatically
3 changed in the last four years as the cigarette.

4 Q If the tobacco companies had done only
5 half the research, from 1954 to the present, that
6 they actually did -- that is, if they had done only
7 half the research -- would you still have concluded
8 that that was very substantial research?

9 A I didn't do it -- your experts looked to
10 the amount of dollars spent. And for lots of
11 reasons, that's a very unsatisfactory way of looking
12 at R&D.

13 So it's much more satisfactory to
14 actually look at -- actually break down -- look at
15 the activities that were doing on.

16 And I documented that the companies were
17 doing research about anything you could think of at
18 all times. And most importantly, in terms of the
19 outcome -- as I said, that the -- the modern
20 cigarette is -- of major products, is the most
21 fundamentally changed product over the last four
22 years.

0270

1 Q If the tobacco companies had done the
2 same types of research that they actually did, but in
3 each type of research had allocated only half the
4 money and effort that they actually did from 1954 to
5 the present, would you still conclude that they had
6 done "very substantial research?"

7 A Certainly could have. Certainly could
8 have.

9 I don't want -- you know, if -- if -- if
10 the outcome was the same, if we'd still have the
11 dramatic -- very dramatic change in the product, and
12 we'd see Premier and Accord and Eclipse and those
13 other things -- like I said, all the other things
14 that were developed in the industry -- and they did
15 it with the same amount of money, that -- that's the
16 whole point.

17 Most of R&D money, like advertising, is
18 wasted. That's why, looking at the amount of money,
19 that didn't tell you very much. You want to look at
20 what -- what you wasted in the sense that it -- it's

21 blind alleys. It doesn't -- it -- it doesn't pay
22 off. Maybe it doesn't produce anything.

0271

1 Q Do you have --

2 A So you really have to look at --

3 Q I'm sorry.

4 A -- the details of what's being done
5 and -- and, more importantly, what comes out of the
6 process.

7 Q Do you have a view regarding whether less
8 would have come out of the process -- there would
9 have been fewer improvements -- if in each area the
10 tobacco companies had spent only half of what they
11 did spend in -- on research and development?

12 My question is whether you have a view.

13 MR. TURKEN: Objection.

14 A I'm telling you: It's not -- you
15 can't -- no expert on R&D should be able to answer
16 that question without the context.

17 I guarantee you, in retrospect -- you
18 could find a substantial percentage of the money, in
19 retrospect, would have been better off not being
20 spent, that it was -- it turned out it was wasted --
21 you know, it didn't turn out for anything.

22 So by that -- you need to know the --

0272

1 what is it? What specific things -- let's look at
2 what they did: Filters, expanded and reconstituted
3 tobacco.

4 And Premier -- if they did all those
5 things, the things that -- that fundamentally change
6 the nature of the cigarette, and -- and you could
7 separate all -- out all the other money they spent --
8 it wouldn't have made much difference.

9 You'd have -- you have to look at what
10 they spent on it, you know, what -- what the outcome
11 would have been.

12 Q So if understand correctly, you're saying
13 that you can't tell whether, the fact that they spent
14 what they did rather than -- you couldn't have told
15 at the outset whether spending what they did, as
16 opposed to half as much, would wind up creating more
17 innovations, because at the outset you wouldn't have
18 known which of the efforts would lead to something
19 and which wouldn't?

20 A You can't say in a specific case --
21 economist is saying that there's some -- you know.
22 And as a -- as a general macro matter, the more R&D

0273

1 expenditures you have, probably the more innovation
2 comes out of the pipe, in a macro -- in a sort of
3 macro way.

4 But if you look at a particular company
5 or industry situation, you really would have to get
6 down into the specifics.

7 Q Is it possible that spending the amount
8 the tobacco companies did on R&D, rather than half
9 that amount, led to more or faster or better
10 innovations?

11 A Whether -- which, now? Whether -- if
12 they were to spend half?

13 Q Yeah. Didn't -- is it possible that, by
14 spending the amount they did rather than the much

15 lower amount on research and development -- is it
16 possible that, by spending the amount they did, they
17 produced more innovations?

18 A Yes.

19 MR. TURKEN: Objection.

20 Q And would it have been possible that, if
21 they had spent twice as much as they did, they would
22 have produced yet more innovations?

0274

1 A Well --

2 MR. TURKEN: Objection.

3 A -- that is -- that is an issue that I
4 specifically address. Okay.

5 And that is: The companies, however much
6 they spend, which is really -- really a red herring
7 from an R/D point of view -- have led -- these
8 defendants have led the world in the amount of
9 innovation, in terms of what has come out of it.

10 And they've, in every way -- as best we
11 can tell from the science and what we all know about
12 the science -- is, they pushed the envelope as far as
13 we know can go.

14 And the problem is: We know -- going
15 back, by the time of the tobacco working group, if
16 not earlier -- that, other than producing a cigarette
17 that doesn't burn tobacco, the approach was to try
18 and produce products that resulted in more -- greater
19 amount of general and selective removal of suspected
20 constituents.

21 And that's what the companies exactly
22 did. And then they finally came up with technology,

0275

1 actually, that produced cigarettes that didn't
2 actually burn tobacco.

3 Q So given that, is it your testimony that
4 if the tobacco companies, in the 1950's and '60s, had
5 spent twice as much on research and development that
6 they actually did, it wouldn't have done anything to
7 speed up any innovations?

8 MR. STREETER: Objection.

9 A I don't think any -- any expert could
10 credibly make a statement as to what would have
11 happened "but for" the situation.

12 I think it would be -- they would be
13 speculating.

14 Q So you don't have a view on that issue?

15 A No. I --

16 MR. STREETER: Objection.

17 Q I'm sorry. Do you have an expert opinion
18 on that issue?

19 A I have a -- I have a view that, not just
20 these companies but many, many entities all over the
21 world -- other companies and other government
22 entities -- have engaged for many, many years on

0276

1 trying to find the magic bullet.

2 And we've known for a long, long time
3 that there isn't one because tobacco is the problem.

4 Q All right.

5 A And so, what you can do -- what we've
6 learned -- and -- and nowhere in the world has anyone
7 come to a different conclusion -- you can try and
8 increase general and selective reduction of

9 compounds, both -- of various sorts of compounds.
10 And then in recent years, you can -- you can develop
11 a way of manufacturing products that don't actually
12 burn the tobacco, which may -- which may be a -- that
13 could, in theory, represent a breakthrough.

14 And that's -- these companies are not the
15 only ones that research this interest -- this issue.
16 It's been researched by many, many other entities for
17 a long time.

18 Q Let me go back to my question.

19 This may take longer than I anticipated.

20 You agree that there have been
21 improvements in the quality of cigarettes as a result
22 of the research and development by the tobacco

0277

1 companies; is that correct?

2 A Correct.

3 Q Do you have an opinion as to whether it
4 is possible that any of those improvements could have
5 occurred at all earlier if the tobacco companies had
6 spent twice as much money on research and development
7 as they actually did?

8 MR. TURKEN: Objection.

9 A I -- in -- in testimony, various -- if we
10 look at the happened, selective and general reduction
11 occurred very fast.

12 The problem was coming up with products.
13 It wasn't in the R&D. The problem was coming up with
14 products that consumers would accept.

15 And that, in part, was due to changing in
16 the population of consumers -- was a very important
17 issue, not matter what -- and that's one of the major
18 drivers why weighted-average tar and nicotine levels
19 fell, because very low tar- and nicotine-level
20 cigarettes have been available for a very long time.

21 But we get new generations of smokers who
22 are -- who willingly accept those products. That was

0278

1 the primary -- the primary thing.

2 And I have looked at Premier -- a
3 particular example -- and the evidence I've seen is
4 that the technology wasn't there, independent of the
5 money -- or a market, probably -- to do it any
6 significantly earlier.

7 So I looked at the specific things that
8 happened; and my conclusion was, a lot of it was
9 driven by the market, by what consumers would accept,
10 and by the -- what the -- and the other part, it was
11 by what -- the technology that was available.

12 MR. ANGLAND: Could you read back my
13 last question, please?

14 (Whereupon, at this time, the
15 referred-to question was read by the
16 reporter.)

17 MR. ANGLAND: Could you check and
18 see if you missed the word "faster" there?

19 COURT REPORTER: I'm sorry. I
20 probably did.

21 THE WITNESS: Oh, because that was
22 not -- yeah, the question was whether -- I understood

0279

1 your question, Mr. Angland.

2 Any of the things that I have

3 concluded happened could have happened significantly
4 faster, "but for"; and my conclusion is "no."

5 BY MR. ANGLAND:

6 Q Thank you. That was my -- I was looking
7 for a one-word answer.

8 And just to be clear, because we got a
9 little disjointed there at the end -- your answer is
10 "no" to my hypothetical where the company spent twice
11 as much as they actually did on research and
12 development?

13 MR. STREETER: Objection.

14 MR. TURKEN: Objection.

15 Q Okay. Let me go back -- forgive me if
16 I'm being a little repetitive here. But I think with
17 that, you know, going back and forth with the
18 question, one or both of us may have lost the track.

19 Do you have an opinion regarding whether
20 any of the innovations that occurred in the tobacco
21 industry would have occurred faster if the tobacco
22 companies had spent twice as much on research and

0280
1 development as they actually did?

2 MR. TURKEN: Objection.

3 A Not in terms of having any material
4 effect. And that is: Would there have been some
5 with weighted-average tar and nicotine ratings
6 falling substantially faster? No.

7 Would other -- would Premier have come
8 into being significantly earlier? No.

9 So the -- the one thing that would have
10 made a material -- would have made a very material
11 difference. And it doesn't have to do with how much
12 the company spends, and it had to do with the Carter
13 Administration fundamentally changing U.S. policy.

14 If the public health community would have
15 decided to continue a program of trying to exhort
16 people to smoke safer products instead of -- instead
17 of trying to concentrate on people quitting and not
18 starting, weighted-average tar and nicotine and lots
19 of other things would have been different.

20 Q As a follow-up to that last point, I'm
21 going to ask you about nicotine in particular --
22 because sometimes nicotine is included in adverse

0281
1 health effects, and sometimes it's used simply as an
2 addictive agent. I just want to make sure the record
3 is -- is -- is clear here.

4 Do you have a view regarding whether
5 there is anything that the tobacco companies could
6 have done between 1954 and the present to reduce more
7 quickly the amount of nicotine in the products that
8 they succeeded in selling to the American public?

9 A Well, no. As you see in data in my
10 reports, there were pretty dramatic reductions in
11 nicotine pretty fast, in -- in the products that were
12 offered on the marketplace.

13 The problem -- and they were vigorously
14 promoted by the companies. The problem was consumer
15 acceptance.

16 MR. ANGLAND: Could you read back
17 the question, please?

18 (Whereupon, at this time, the
19 referred-to question was read by the

20 reporter.)
21 THE WITNESS: I'll give you all --
22 I'll give you -- because, I mean, it's not a
0282
1 yes-or-no answer. I have to explain.
2 And that is: There are a couple --
3 there's a couple very important things to economists
4 that shed light on this.
5 One, the availability of low --
6 relatively low nicotine products in the market was
7 quick -- quite quick here. The products were
8 vigorously promoted. And -- but it took time, of
9 course, for consumers to accept them.
10 And, second, very importantly, if we
11 look at all the rest of the world, as we know from
12 research, the U.S. led almost everywhere else in this
13 world, where this supposed conspiracy not to
14 introduce safer products existed and which --
15 restraining competition and restraining innovation,
16 it's just inconceivable that the U.S. would lead the
17 world, which is, you know, uncontroversial.
18 For the first 20 years of the
19 industry, early '50s, the U.S. led the world in both
20 introducing lower nicotine and tar products, and in
21 also -- and in having success in the marketplace.
22 So the answer is that, what an
0283
1 economist can do instead of speculating about what
2 would happen if some company spent a lot more money,
3 and what the science made available and things like
4 that -- and I have made conclusions about it.
5 We can look in the marketplace, and
6 we can do benchmark -- and we could say, "Gee, if
7 it's faster here, what would be the basis for arguing
8 that something would have been different, but for?"
9 There's no support for that
10 conclusion.
11 Q Do you recall my prior question?
12 A Yes. Was there anything -- any -- could
13 it have been faster?
14 Q Yes.
15 A And I've given you the answer, which is:
16 There's no support for --
17 Q I'm sorry. Maybe I missed it, but I
18 still haven't heard the answer. I'll try again.
19 Do you have an -- and if there are any
20 words you don't understand, just ask me, and I'll do
21 my best. I blow questions now and then, and I'm
22 happy to try to correct it.
0284
1 Do you have an opinion regarding whether
2 there is anything that any tobacco company could have
3 done from the period 1954 to the present that would
4 have led to a quicker reduction in the average amount
5 of nicotine in cigarettes sold to the public?
6 MR. TURKEN: Objection.
7 MR. STREETER: Objection.
8 A In weighted-average nicotine levels?
9 Q Yes.
10 A Not within the realm of any plausible
11 conduct that I could think of.
12 Q Okay. My question was whether you have
13 an opinion. Do you mean, yes, and the opinion is

14 that it's not within the realm of any -- my question
15 is: Do you have an opinion?

16 A Yeah.

17 Q Okay. And is that opinion that there is
18 nothing plausible that any cigarette company could
19 have done, between 1954 and the present, that would
20 have more quickly reduced the average amount of
21 nicotine in cigarettes sold to the U.S. public?

22 A See, I -- I don't know what -- are you

0285

1 asking, the outcome in the market? Weighted-average
2 nicotine level --

3 Q Yes.

4 A -- as opposed to what's provided in the
5 market?

6 Q Yes.

7 A Yes; I have an opinion.

8 Q And was the opinion as I state, that's
9 there is nothing they could have done, the tobacco
10 companies, that would have substantially accelerated
11 their production?

12 A -- substantially accelerated, that's
13 correct. That's my opinion.

14 Q Okay. Do -- as an economist, would you
15 say that cigarette companies, tobacco companies, have
16 an incentive to reduce the amount of nicotine in
17 products?

18 A It depends on the situation.

19 Q Are there any factors that would give
20 cigarette companies an incentive not to reduce the
21 amount of nicotine, as much as they might be able to?

22 A Well, remember, the facts are that, for a

0286

1 long time, very low tar/nicotine cigarettes have been
2 available.

3 A product with essentially no nicotine
4 was made available. The problem is that people don't
5 buy it; and that's because we know that the
6 primary -- the primary, quotation, benefit that
7 people get from smoking is the -- is the nicotine.

8 Q I, you know, understand your position
9 from having read your report; but I asked a different
10 question.

11 The question is: Are -- can you see any
12 what or any reason why cigarette companies may have
13 an incentive -- an incentive -- not to reduce the
14 amount of nicotine in their cigarettes as much as
15 they were technologically capable of doing?

16 A I can look to the -- I can look to the
17 evidence in the marketplace, which is -- I could look
18 at what they did, okay, which is they -- all of them
19 introduced dramatically lower nicotine products, and
20 they sold them.

21 Q Does that mean -- I'm sorry. I didn't
22 mean to cut you off.

0287

1 A And -- so, I don't need to -- I don't
2 need to address theoretical incentives. I can look
3 at what they did.

4 Q Well, you may not need to address it; but
5 if you have an opinion on it, I'm entitled to hear
6 it. And if you don't, I think that's just great.
7 The jury ought to know that you don't have an opinion

8 on it.
9 My question to you, sir, is: Do you have
10 an opinion whether there is any incentive the tobacco
11 company might have to not reduce nicotine as much as
12 it was capable of doing?

13 And when I say "reduce nicotine," I mean,
14 reduce the nicotine content of its cigarettes as much
15 as it was capable of doing.

16 MR. TURKEN: Objection.

17 A I certainly know that there are
18 allegations made by various people, including the
19 plaintiffs -- in this case, that nicotine's addictive
20 and that's the reason why you get your sales.

21 Why would you want to -- why would you
22 want to reduce nicotine? That would be crazy.

0288

1 The problem is, is that the market works
2 it out. People aren't going to buy it if it doesn't
3 have enough nicotine.

4 The companies had to compete to reduce
5 nicotine because there was a demand for it; and
6 that's what -- they did because of competition.

7 And it's not clear -- you know, the --
8 the -- the reduction in nicotine levels were
9 responsive to market, and may have -- may have
10 kept -- you know, may have kept the market from
11 declining as fast -- because, as any situation, when
12 it's your market you follow the market, where the
13 consumers go. You provide them the products they
14 want. And your sales don't decline, maybe, as much
15 as they otherwise would.

16 Q So based upon all the work you've done,
17 if I understand you correctly, it's your opinion that
18 there was no factor that gave cigarette companies an
19 incentive to not reduce nicotine as quickly as they
20 could; isn't that right?

21 MR. STREETER: Objection.

22 A I don't know. That's -- that's a

0289

1 meaningless question.

2 That's like: Did the -- did -- in any
3 industry, does the company have an incentive to raise
4 the price 20 percent above the competitive price? Of
5 course.

6 The question is: What -- what can you do
7 about it? You're in a competitive market; you have
8 to -- you're governed by the market forces. So...

9 Q But -- but you -- but in that example,
10 you're able to ask whether the company would have an
11 incentive to do it. You're able to analyze that
12 issue and express an opinion as to whether it has an
13 incentive; is that right?

14 A Yes. I --

15 Q And it may be dwarfed by other
16 counter-incentives or counter-factors; is that right?

17 A The market discipline -- okay -- and --
18 and -- and the problem here -- the problem you're
19 talking about is not so clear.

20 You're saying, the issue is -- certainly,
21 the cigarette companies want to have people continue
22 to smoke.

0290

1 Now, if they continue to smoke with low

2 nicotine or high nicotine, that's fine. From the
3 company's point of view, either way is fine. They
4 just want to have customers buying products, as
5 anything.

6 So if they will buy low-nicotine
7 products, which they've ended up doing, they get
8 sales. And there's no benefit to the company in any
9 way from having -- "Gee, I wish those people bought
10 high-nicotine products" -- that's -- there's no
11 incentive there. That's the problem.

12 Incentive is getting people to buy the
13 product.

14 Q And do you have a view regarding whether
15 there were any levels of nicotine in cigarettes at
16 which there might be an adverse impact on the
17 cigarette companies in that fewer people would
18 continue to smoke after a while?

19 MR. STREETER: Objection.

20 A No. I think the problem is: If you take
21 the hypothetical, the one company produces only
22 De-Nic, they're not going to sell many products.

0291

1 Q Um-hum.

2 A So it's the competitive forces. It's
3 why -- you know, I'd like to have a 20 percent higher
4 price, but if -- and the market's going to offer the
5 market price, I'm not going to get any sales.

6 That's -- okay. So it's not -- it -- but
7 it has -- doesn't have to do with the nicotine. It
8 has to do with what people want to buy.

9 Q Now, when you say the market and
10 competition will dictate it, that presumes that in
11 fact competitive forces are working in the market;
12 correct?

13 A Which has clearly been the case.

14 Q I understand that's your position.

15 But -- but you do -- but your analysis is
16 based -- this bit of your analysis is based that
17 premise?

18 A No, because it's not just the market.
19 It's what consumers -- what consumers will do.

20 It's very -- look -- look at European
21 countries, where rolling your own is 50 percent of
22 the market.

0292

1 Q Um-hum.

2 A I don't care what the industry does;
3 people are going to vote -- people vote with -- you
4 know, with their -- with their own preferences. And
5 they decide what they're going to do. So, it's not
6 just the market.

7 Q Okay.

8 A It's what consumers want to do.

9 Q Given all that, Dr. Scheffman, I still
10 want to be clear on the record: Do you or do you not
11 have an opinion regarding whether there is any sense
12 in which tobacco companies have an incentive to keep
13 the nicotine level in cigarettes higher than they are
14 capable of reducing it to and selling the products
15 at?

16 MR. STREETER: Objection.

17 A That -- if they can get satisfactory
18 sales?

19 I think the evidence is very clear that
20 what they've done is, they've helped drive the levels
21 down, and people -- and consumers have accepted it.
22 No. There's no basis for why they'd want
0293
1 to sell more nicotine than less. Their point is that
2 they want to sell cigarettes if someone will buy
3 them.
4 Q My question was whether -- whether you
5 had an opinion. Do you?
6 A As to what, now?
7 Q Do you have an opinion as to whether
8 cigarette companies have any incentive to not
9 decrease the amount of nicotine in their cigarettes
10 as quickly as they could?
11 A I think they have an incentive not to
12 reduce nicotine to levels at which people won't buy
13 the cigarettes.
14 Q Is that the only incentive you can think
15 of that would inhibit the extent to which tobacco
16 companies would lower the amount of nicotine in their
17 products?
18 A Yes.
19 Q And bear in mind, I'm not asking whether
20 something is true or false in the real world. I'm
21 just asking whether there's any incentive you can
22 conceive of that might prevent them --
0294
1 MR. TURKEN: Objection.
2 Q -- from wanting to lower nicotine, other
3 than the one you identified?
4 MR. STREETER: Objection.
5 MR. TURKEN: Objection.
6 A If the customer base stays the same or
7 could increase -- lowering nicotine, they have reason
8 in the world to lower nicotine; and that's what
9 they've done.
10 Q And isn't it possible, Dr. Scheffman,
11 that if -- if nicotine were lower to the point that a
12 lot of people still bought it and liked it, but over
13 time grew less addicted or habituated to cigarettes
14 and then dropped off smoking, stopped smoking, that
15 the net effect could be adverse for the tobacco
16 company?
17 MR. TURKEN: Objection.
18 A And that is, in fact, what's happened --
19 Q Okay.
20 A -- in part.
21 Q And if -- given that fact, isn't it true
22 that -- looking at that factor in isolation -- that
0295
1 would be an incentive not to reduce nicotine as much
2 as one would be capable of reducing it?
3 A Well, that's really strange speculation.
4 Okay. You've a situation where you're
5 competing with companies that lower tar and nicotine.
6 Let's talk of the situation of filters versus --
7 versus -- versus unfiltered and -- and when lower tar
8 and nicotine really began to make substantial
9 inroads -- the company's going to sit on their hands
10 while they realize they're getting killed by their
11 competitors by offering filters or lower tar and
12 nicotine -- because, well, gee, down the road people

13 might -- you know, people might be more inclined to
14 quit.

15 That's just too -- that's too
16 speculative. Again, imagine a company giving up
17 marketshare today in sales, based on that speculation
18 of -- of what could happen out in the future.

19 Q And that again assumed that there was
20 competition on this issue from the other companies in
21 the industry; right?

22 A Well, there was undeniably competition on
0296
1 the issue. I mean, there can't be any dispute, in
2 terms of products available on the market and getting
3 sales.

4 Q It's again up to the finder of fact,
5 whose province neither you nor I will assert -- there
6 is competition. I'm just trying to confirm that your
7 analysis is once again based upon the premise that
8 there is competition in this dimension.

9 MR. TURKEN: Objection.

10 A No.
11 The theory is such to -- suppose you're a
12 monopolist and you have this theory.

13 Q Um-hum.

14 A Okay?

15 But the problem is, is that -- and
16 there's a demand, because of concern with health and
17 everything, for lower tar and nicotine. But you
18 don't offer it. Okay? What happens?

19 Well, you might take the hit now. You
20 might -- quit rates might -- quit rates might be
21 higher now. Wouldn't it be better to follow the
22 market?

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1 That's -- in almost any industry, that's
2 what you do.

3 Q Let's take your example. Let's assume we
4 had a monopolist, one company in the world that made
5 all the cigarettes in the world.

6 Let's assume, based upon its consumer
7 studies, that company found out that, all things
8 considered, people would prefer lower nicotine
9 cigarettes -- at least, a lot of people would prefer
10 lower nicotine cigarettes.

11 But they also found out that, if this
12 lowered nicotine to that level, it would be likely,
13 after a couple of years of smoking at that level,
14 that smokers would decide that they no longer really
15 needed to smoke, the nicotine pull wasn't strong
16 enough, and they would abandon smoking.

17 In that situation, putting aside how all
18 the costs and benefits might balance for that
19 monopolist, wouldn't there be a disincentive to the
20 extent that lowering the nicotine level in cigarettes
21 might eventually ween people from smoking cigarettes?

22 A You can -- you can create a speculative
0298
1 hypothetical --

2 Q I have.

3 A -- no, but you've assumed -- no, but you
4 assume -- you know, if you assume -- yes, I'm going
5 to have to agree, if you make assume -- I'm saying,
6 but you're assuming a way, we don't take any hit --

7 because we're not offering consumers the products
8 they want now, we don't take any hit now.
9 I mean, there are not many markets --
10 many markets like that, where -- where companies can
11 take that sort of risk, no matter what their strength
12 or their position is.

13 Q Well, there aren't that many markets
14 where people are addicted to the product, are there?

15 A Yeah. But there --

16 MR. TURKEN: Objection.

17 A -- there are a lot of people that -- not
18 speaking as a medical expert, there are a lot of
19 people that aren't addicted in the sense that
20 millions and millions and millions of people have
21 quit.

22 Q Um-hum. But in my example, then -- I
0299

1 understand that you say you'd have to look at how
2 many sales they'd lose because people rebelled
3 against not a low-nicotine cigarette. I understand
4 that, but that would go into the calculus.

5 But it certainly could be true that the
6 ratio of people they'd lose to the -- the people they
7 would lose who wanted a low-nicotine cigarette would
8 be outweighed by the number of people that they would
9 lose if they gave the lower nicotine cigarette and
10 those people were weened from it; isn't that a
11 possibility?

12 A You know, we can do theoretical examples.
13 It just seems to be totally irrelevant.

14 Q Well, it may be; but it's my example; and
15 I think it's relevant.

16 And can't we -- couldn't we sit here and
17 do the math and prove how there could be -- by -- if
18 we chose appropriate percentages for the people who
19 would leave because they didn't get the cigarette --
20 the low-nicotine cigarette -- versus the people who
21 would leave if they were weened from high-nicotine
22 cigarettes -- couldn't we come up with an example
0300

1 where it would be in the net economic interest of the
2 monopolist, in our hypothetical world where there's
3 only one cigarette company -- where it would be the
4 economic interest of that monopolist to not lower
5 nicotine as much as it could?

6 MR. TURKEN: Objection.

7 Q That's possible, isn't it?

8 A Is it a world monopolist?

9 Q Yes.

10 A Oh, it's a world monopolist.

11 Q I said "world monopolist."

12 A Okay. World monopolist.

13 No entry, no one can enter?

14 Q Let's assume that.

15 A Okay. Right.

16 And then you assume everything else --
17 then, I guess -- you know, it's possible -- it's
18 possible as a matter of theory to get that result.

19 Q Okay. Now, in the automobile industry,
20 what percentage of the important developments,
21 technological developments, have occurred outside the
22 industry?
0301

1 A Outside the manufacturer?
2 Q Yeah.
3 A A lot.
4 Q Okay. And when you talk about
5 developments in that sense -- oh, let me give an
6 example. I just want to figure out what you mean by
7 some of your -- you know, statements in your report.
8 Automobiles use micro-chips in them;
9 would you agree with that?
10 A Yes.
11 Q And micro-chips were not invented, in the
12 first instance, by the automobile industry; is that
13 right?
14 A Correct.
15 Q Is that an example of the sort of
16 "development" that you're talking about in, say, the
17 automobile industry that came from outside the
18 industry?
19 A That's one -- that's one sort of example.
20 Q Okay. What other sorts of examples are
21 there?
22 A The automobile manufacturers are -- much
0302
1 more today -- but are project managers and assemblers
2 of parts. General Motors, in particular, has been
3 much more -- integrated -- but -- but the very large
4 part-supplying industry and lots of contract research
5 outfits have -- have historically been very important
6 to innovations in the automobile industry.
7 Q Um-hum. So that's a -- you're talking
8 about a situation where, basically, the automobile
9 companies procure parts from others.
10 Those parts might improve significantly;
11 and thus, the final car is improved significantly.
12 Is that right?
13 A Yeah; but not just parts. That is,
14 the -- suppliers often produce the critical
15 innovation. "We can do this" -- look at the air bag,
16 as just one example. But a number of things have
17 come from the parts industry, the innovations.
18 Q Um-hum.
19 A Parts and components and services.
20 Q What about the semi-conductor industry;
21 would you say the same was true there?
22 A Certainly, a lot of the -- a lot of the
0303
1 innovation has come in that case from -- from outside
2 the industry entirely, from basic and applied
3 research done in labs and done by universities.
4 Q Um-hum. What about the prescription drug
5 industry; how much of the innovation there comes from
6 outside the industry?
7 A These days, a lot.
8 But in the old days, where it was mainly
9 a chemically -- chemical research -- a lot more of it
10 was done in-house.
11 But there was always, you know, a
12 substantial role for contract research with
13 universities and independent labs and researchers and
14 things.
15 Q Um-hum.
16 A Could we take a short break?
17 MR. ANGLAND: Sure.

18 VIDEOGRAPHER: Off the record at
19 3:44.
20 (A recess was taken.)
21 (Scheffman Exhibits Number 3 and 4
22 were marked for identification.)
0304
1 VIDEOGRAPHER: Back on the record at
2 3:49.
3 BY MR. ANGLAND:
4 Q Dr. Scheffman, if you'd look at page 103
5 of your report; and I just want to ask you about the
6 bottom line -- in particular, about what I'm sure is
7 a typo. But I just want to be absolutely clear.
8 In the bottom line, do you see the word
9 "counties"? Should that be "countries"?
10 A Yes.
11 Q Okay. Otherwise, I was going to have to
12 ask you to point me to all the county -- cross-county
13 analyses you had done.
14 You state that -- in paragraph 291 of
15 your report -- that, in connection with a 1986
16 consideration of a ban on cigarette advertising, no
17 consensus appeared that a ban on significant
18 advertising would significantly decrease smoking
19 prevalence in the U.S. Do you see that?
20 A Yes.
21 Q Did a consensus appear that the ban would
22 not significantly decrease smoking problems in the
0305
1 U.S.?
2 A No.
3 Q Okay. There -- there basically was no
4 consensus?
5 A Well, I think it's stronger than that.
6 There was a strong consideration at that
7 time, as there have been at various other times, of
8 perhaps promulgating a ban. And policy makers
9 decided in the end that, for a variety of reasons, it
10 wasn't -- it wasn't warranted.
11 Q Okay. I'm -- I'm just trying to figure
12 out what -- what -- what position you're taking here
13 on consensus.
14 I understand that there wasn't a
15 consensus saying, "Yes, a ban will have this big
16 effect on smoking problems."
17 Are you saying that there was a consensus
18 to the opposite effect, a consensus that it would not
19 have an effect -- a ban would not have a significant
20 effect on smoking prevalence?
21 A No.
22 Q So there -- there was no consensus either
0306
1 way, then?
2 A Yeah. All I'm saying is: This didn't
3 arise in a vacuum. Someone seriously considered
4 and -- considered it. And there wasn't -- they just
5 decided not to go forward with it. That's all. It
6 wasn't a consensus.
7 Q Okay.
8 A There was a consensus -- there was a
9 consensus to maintain the status quo, by policy
10 makers -- obviously --
11 Q But what you're not saying, that

12 everybody who looked at the data said, "Yep, it's
13 absolutely clear. There will be no significant
14 reduction as a result of an advertising ban"?

15 A -- clearly, whether people strongly
16 advocated a ban.

17 Q Okay. At the risk of being slightly
18 repetitive, let me just see if I can sum this up and
19 maybe conclude my examination.

20 If I understood you correctly, it's your
21 position that there's basically nothing the cigarette
22 companies could have done, in terms of public

0307

1 statements about the health consequences of
2 cigarettes, between 1954 and the present, that would
3 have substantially reduced the number of people who
4 smoked in the U.S. -- nothing beyond whatever they
5 did -- is that correct?

6 MR. STREETER: Objection.

7 A That would have had a substantial
8 long-term effect.

9 Q Okay.

10 A For a whole variety of complicated and,
11 you know, factual bases, yes, that's my conclusion.

12 Q Okay. And in giving that -- in
13 concluding that there is nothing the cigarette
14 companies could have done that would have, to a
15 substantial degree, on a long-term basis, reduced the
16 number of smokers in the United States -- does
17 that -- is that true even if all the cigarette
18 companies had taken the same public position
19 regarding cigarettes being terribly dangerous to
20 people's health?

21 A Well, see, I don't -- you know, I got
22 down this hypothetical this morning. And -- and I

0308

1 can't separate my answer from what could plausibly
2 occur.

3 That's why I asked you, in -- in your
4 doom's day scenario is: "And after that, we turn --
5 we turn out the lights, because we're not going to
6 sell this product anymore."

7 Would that have had an effect for a
8 while? Well, it -- it -- it certainly could have.

9 But I'm talking about, within the
10 plausible, within the bounds of anything we've ever
11 known that's happened in human history about
12 companies facing this sort of problem -- if the
13 companies would have acted differently in their
14 public posture on the smoking and health issue, my
15 conclusion is it wouldn't have had any significant
16 long-term effect on smoking behavior.

17 Q Okay. To try to make it more specific to
18 avoid ambiguity about, what does the company say --
19 if what the companies had said was -- and if they had
20 all said this -- and this is the only sense in which
21 my question may be a little different from what I
22 asked this morning -- all the companies had said,

0309

1 "We've all looked at it. And you know what, if you
2 smoke cigarettes they will probably kill you, in the
3 long run."

4 Is it your opinion that that would have
5 had, in the long run, no appreciable effect on the

6 number of smokers in the United States?
7 MR. STREETER: Objection.
8 A Well, that -- I mean, I -- that at --
9 that at no time would have been an accurate statement
10 by anybody. No one has ever made such a statement.
11 Q Well, let's just -- I'm sorry.
12 A One of the things that would have
13 happened in '54, if the companies would have said
14 that, is a lot of people in the medical community
15 would have said, "That's crazy. That's just not
16 right."
17 We're not saying there's -- but you're
18 saying that every individual smoker is likely to die
19 because of smoking? And we're certain in 1954 there
20 would have been tremendous controversy on the other
21 side on this issue.
22 Q Okay. Let me --
0310
1 A So I just can't -- I don't -- I can't --
2 have difficulty really being able to deal with a
3 hypothetical that just -- which is impossible to
4 understand how it could happen.
5 Q Let me give you another hypothetical,
6 then. Let's assume that in 1964 every cigarette
7 company came out and said, "We've looked at it. And
8 we have concluded that the studies are right, that if
9 you smoke that will increase your chance of dying of
10 lung cancer by roughly 1000 percent."
11 MR. STREETER: Objection.
12 A That's stronger -- that's much, much
13 stronger than what the Surgeon General said in 1964.
14 There wasn't a consensus.
15 Q And what I'm --
16 A There wasn't a basis for -- the -- I
17 couldn't understand -- I couldn't sort of get my mind
18 around certain hypotheticals.
19 I can say, "Suppose the companies -- when
20 the Surgeon General's report came out -- and said,
21 'We agree with the Surgeon General.'"
22 Q Okay. That's not my hypothetical.
0311
1 And you had -- and because you and I may
2 disagree about what the epidemiological evidence
3 shows -- and, of course, I at least don't get to
4 express an opinion on that issue -- I just have to
5 give you a hypothetical. The jury will decide what
6 they thought the relative risk known to people was in
7 1964.
8 A I'm not -- I'm not evaluating -- I'm
9 saying what the Surgeon General said.
10 The Surgeon General in 1964 didn't say
11 that.
12 Q Yeah; and I'm not talking about what the
13 Surgeon General said at all. Let's make that clear.
14 I'm asking to you consider the following
15 example: Let's assume the cigarette companies,
16 looking at the -- whatever evidence they looked at --
17 came to the conclusion that smoking cigarettes
18 increased one's -- one's chances of dying from lung
19 cancer by 1,000 percent. And they came out and make
20 a public statement to that effect.
21 In your opinion, would that have had any
22 substantial long-term effect in decreasing the number

0312

1 of smokers in the United States, in that hypothetical
2 situation?

3 A Well, I -- I -- I just have -- I don't
4 know whether I can -- whether it's possible to
5 envisage that -- I could envisage a -- you know, a --
6 situations contrary to what actually happened but --
7 that you could conceive of -- okay?

8 You're, like, ask -- you know, had asked
9 me: If -- if the companies blew up their factories
10 and everything like that, would the world have been
11 different? Well, yeah, it might have been.

12 But I can deal with -- I can deal with
13 hypotheticals that didn't occur. I can't deal with
14 things that -- they would say something that was --
15 on which there was clearly not a scientific consensus
16 in 1964 and not any basis for it?

17 Q Well, just to be clear, I believe we're
18 going to offer proof that there was a basis for that
19 in 1964. I don't expect you to agree with it.

20 But I'm now asking you: If, in fact, the
21 companies had made those statements -- and I realize,
22 you say that's an unreal hypothetical -- but I'm

0313

1 asking you: If, in fact, they had made those
2 statements, do you have a view regarding whether that
3 would have had any long-run effect in substantially
4 reducing the number of smokers in the United States?

5 A Well, I have -- I have a couple answers.
6 And one -- and I'll try and be brief on
7 the others.

8 There's lots of -- there's lots of
9 evidence, historically, within the U.S. and across
10 other countries that, although that would have been a
11 big story, it -- it probably wouldn't have had a
12 significant long-term effect.

13 Second, the problem with -- the problem
14 with your -- you asked me to -- you posit a
15 hypothetical in which there was definitely not a
16 scientific consensus on that, in which people
17 understood, in the Surgeon General committees and in
18 public policy, that these were serious questions of
19 people's health.

20 There are also serious issues of
21 employment and other sorts of things, reliance on the
22 industry. That's why the -- why the government was

0314

1 very careful.

2 And what would have certainly occurred,
3 if someone had done that sort of thing -- and they
4 did to some of the people who were more vocal on
5 saying, "Wait a minute. We don't have that -- we
6 don't have a basis for saying that. There is a
7 problem here probably, but we don't have a basis for
8 saying that."

9 So in that -- in your hypothetical world,
10 if the Surgeon General comes out and said, "These
11 guys are crazy. The science isn't there to make that
12 conclusion" -- that's the problem with -- that's the
13 problem with -- with the hypothetical, one of the
14 many things.

15 I can't -- you know, it's just much too
16 speculatively to figure out what would have happened.

17 Q Given all that, do you have an opinion
18 regarding whether such a statement by the tobacco
19 companies would have had a substantial long-term
20 effect in reducing cigarette smoking?
21 The question is just whether you have an
22 opinion.

0315

1 MR. STREETER: Objection.

2 A About some completely unrealistically
3 hypothetical? I can't tell you more than I did.

4 Q Well, what I'm asking you to tell me is
5 whether you have an opinion.

6 If your point is you don't have an
7 opinion because it's too hypothetical, I understand
8 that answer and I move on to my next point.

9 I'm just trying to find out whether you
10 have an opinion.

11 MR. STREETER: Objection.

12 A It -- it's -- it's too incomplete a
13 hypothetical.

14 Q If I asked you -- if I amend the
15 hypothetical just to say, hold everything else in the
16 world constant and just inject that one statement in
17 1964 -- everything else up to then constant,
18 everything else occurring then constant -- do you
19 have an opinion -- my question is just whether you
20 have an opinion as to whether such a statement would
21 have, in the long run, caused a substantial decrease
22 in smoking prevalence in the United States.

0316

1 A And this occurs in 1964?

2 Q Yes.

3 A The best we can tell from the evidence,
4 the answer is: It would have been a big story, but
5 it wouldn't have had any significant long-term
6 effect.

7 Q Thank you.

8 A But I'm trying to address real evidence
9 with a totally -- a totally unrealistic hypothetical.

10 Q Well, in the end the jury gets to decide
11 whether the hypotheticals are realistic or -- or not.
12 But I understand your -- your observation.

13 I would ask you to look, Dr. Scheffman,
14 at what has been marked as Scheffman Exhibit No. 2;
15 and ask if you can identify that for me.

16 A Yes.

17 Q What is it?

18 A It's a list of materials reviewed, that
19 were turned over in connection with this report.

20 Q Is it a list of the materials that you
21 relied on in coming to your conclusions?

22 A Well, I don't -- I never use "relied on"

0317

1 because it means something a lot -- it is in
2 materials that I -- that I did -- among the materials
3 I reviewed and that I thought provided you with a
4 complete basis for what my -- where my opinions came
5 from.

6 Q Okay.

7 A I have reviewed a lot of other materials.

8 But, you know, it would be much, much
9 vast -- we tried to, especially since we've testified
10 many times, now, that -- try and -- all right, let's

11 identify the materials that are most relevant.
12 Q Well, let me distinguish between two
13 different categories of materials not on the list --
14 potentially not on the list. Okay?

15 I understand you might have looked at
16 many documents and just decided they didn't bear on
17 the issues enough, and so you didn't, as I would use
18 the term, "rely upon it." You read them, but they
19 didn't mean anything.

20 And I understand that those would not
21 have been included on the list. Is that fair?

22 A Yes.

0318

1 Q Okay. In contrast, if there were 10
2 documents that tended to support a given proposition
3 you were making, and you only include seven on the
4 list, but will rely at trial upon the fact the other
5 three documents are there -- then that's something
6 I'd want to know about.

7 So my question is: Are you going to rely
8 at trial on any documents not included on that list
9 or handed me -- to me today by your counsel?

10 There are, I think, a small number -- ten
11 additional documents that were inadvertently left off
12 the list.

13 MR. STREETER: Can I just add one
14 more caveat?

15 MR. ANGLAND: Yes.

16 MR. STREETER: My transmittal letter
17 to you also said that the documents cited in the
18 report are reliance materials as well.

19 MR. ANGLAND: Oh.

20 MR. STREETER: And those were
21 produced to you as well.

22 MR. ANGLAND: That's -- I accept

0319

1 that -- that amendment.

2 BY MR. ANGLAND:

3 Q So the question is: Between the
4 documents on that reliance list and the -- which is
5 Exhibit 2 -- and the documents themselves cited on
6 Exhibit 1, is that the universe of materials upon
7 which you -- I have to use the word -- rely, in
8 support of the conclusions you give in your report?

9 A Well, I can only tell you this: These
10 are -- to the best of my knowledge, one, give you --
11 give you a manageable basis of my opinions, some of
12 the bases of my opinions.

13 And I would provide the materials from
14 which -- to the extent I use any specific materials
15 in my testimony, it would come from this.

16 But there's an issue here. I very
17 extensively studied the history of the industry,
18 going back to the late '40s, both in the U.S. and
19 worldwide. And we don't -- that's a mountain of
20 things. Okay?

21 And so I'm -- I presume we're going to --
22 I'm going to testify at trial and say, "I've -- I've

0320

1 just -- we've just, you know, exhaustively, as best
2 we can, looked at everything we can. And the -- and
3 the net conclusion of it is this, and that this --
4 this document is a represent -- representative

5 quotation of what -- of what -- of certain things
6 that were happening in 1952," or whatever.

7 Q Do you recall including on your reliance
8 list a thick document relating to genital herpes?

9 A I remember something about -- I remember
10 something coming up somewhere where that -- I mean,
11 that's hard to forget. So there might be.

12 Q My question for you, sir, is: Can you
13 give me some help and let me know for what you were
14 relying on --

15 A Point me to the document.

16 MR. ANGLAND: Off the record.
17 I'm not even sure I have it with me,
18 but I'll see in a moment.
19 (Pause.)
20 MR. ANGLAND: No; I don't.
21 BY MR. ANGLAND:

22 Q But I take it that you don't, as you sit
0321

1 here, recall in which respect you --

2 A Well, I don't -- I -- I dimly recall some
3 document that had that.

4 MR. ANGLAND: Actually, I may be
5 able to --

6 MR. STREETER: I take it, we're back
7 on the record now?

8 MR. ANGLAND: Yeah.
9 BY MR. ANGLAND:

10 Q Let me not mark as an exhibit but -- but
11 wander around the room and show you a document.
12 (Witness perusing.)

13 A Oh, yeah. Yeah.

14 Q Okay. Can you tell me what -- what
15 propositions are there or what you relied upon that
16 particular report for?

17 A Well, we have a discussion in the report
18 that talks about how -- how the scientific method
19 works in practice in government policy on decisions
20 on drug approvals and everything like that, that
21 there isn't -- you know, unanimity is not the
22 required -- is not required. It's sort of a
0322

1 consensus, maybe, with some formal rules as to
2 what -- and this is an example, I think, of -- this
3 is -- we cite some examples.

4 And I best recall, this is maybe one that
5 explain -- that gives you an overview of what the
6 process is like in drug approval with FDA.

7 MR. ANGLAND: Okay. I have no
8 further questions.

9 VIDEOGRAPHER: Should we go off the
10 record?

11 MR. ANGLAND: Yeah, why don't we,
12 for a minute -- a minute -- just while we sort papers
13 and a few other things.

14 VIDEOGRAPHER: Off the record at
15 4:08.
16 (A recess was taken.)
17 VIDEOGRAPHER: Back on the record at
18 4:10.

19 EXAMINATION BY COUNSEL FOR THE PLAINTIFFS, NATIONAL
20 ASBESTOS WORKERS MEDICAL FUND, ET AL.:
21 BY MR. MINTZER:

22 Q Good afternoon. This morning I
0323
1 introduced myself. My name is Glenn Mintzer, and I
2 represent the plaintiffs in the National Asbestos
3 Workers case.
4 I've just got some follow-up questions
5 and some things related to the National Asbestos
6 Workers report. I'll try not to go over anything
7 that you've already talked about.
8 I marked two exhibits. Could you take a
9 look at Exhibit 3 and identify that for me?
10 A Yes; that's my report, expert report,
11 produced in connection with this matter.
12 Q Okay. And is your CV in there as well?
13 A Yes.
14 Q And is that -- could you just look and
15 see if that's your most current copy?
16 A No. September of 1999.
17 Q Okay. Have there been significant
18 changes since then?
19 A I have some other cases in which, if I
20 put under specific testimony, would show up.
21 Q Okay. Is that the only change you can --
22 A I've moved.
0324
1 Q Okay.
2 A My office address is moved.
3 Q And do you know what those cases are, the
4 additional cases?
5 A Well, we have this -- we have the Blue --
6 the Blue Cross case. I have another workers' comp.
7 case, at least -- let's see, which one is this? -- at
8 least one, if not two, that are somewhat similar to
9 the Sandwich Chef case, in which I've produced a
10 report.
11 I produced a report in a case called
12 "Simon," another smoking and health case.
13 I produced a report in a case pending in
14 trial right now on FTC suing a company alleging it's
15 a pyramid scheme.
16 I don't -- you know, I don't know
17 whether --
18 Q Okay.
19 A We might -- you know, I could
20 cross-reference January's.
21 Q Is that a more recent copy?
22 A That's more recent than -- than the Blue
0325
1 Cross case. That's January 2000. And so, I have the
2 Felice case. I forgot about that.
3 I had a case involving laser --
4 laser-driven products used in cosmetic surgery. And
5 I should have -- and I produced a report.
6 Q Okay. And does Exhibit 3 contain all of
7 the opinions that you plan to offer at trial in this
8 matter?
9 A Certainly, it was my intention to try and
10 provide that.
11 Q Okay. At least, up until this time?
12 A Yes.
13 Q Okay. And could you take a look at
14 Exhibit 4, please, and identify that.
15 A Well, this is the same thing that I was

16 just talking with Mr. Angland about. It's a -- it's
17 a exhibit. It's -- the same answer: We're trying --
18 trying to provide, you know, as -- as complete a
19 basis for -- you can understand where -- what --
20 where my opinions came from, in terms of source
21 material.

22 Q Okay. So your characterizations about
0326

1 Exhibit 2 would be the same for Exhibit 4?

2 A Yes.

3 Q Okay. And with the exception, again, of
4 the documents that counsel provided us this
5 morning -- to the best of your knowledge, between the
6 things that are mentioned in your report -- and I
7 think there's an additional materials section also
8 appended to your report -- and Exhibit 4, is that all
9 the materials -- I know you don't like the word
10 that -- but that you plan to rely on?

11 A Well, I say the same thing: I don't --
12 anything I would specifically use in the trial is in
13 this -- as best I know, is in this material.

14 I think this accurately -- it -- it
15 provides you with a manageable set of material that I
16 can point to and limit myself to that and say, you
17 know, "This is where this came from," with a caveat
18 that I certainly am prepared to say, "I looked at a
19 lot more stuff." And so, what I'm citing here about
20 what happened in 1954 has a lot of -- more bases than
21 this particular document.

22 MR. STREETER: I'd just like to
0327

1 state for the record, as well: In connection with
2 the expert report that was produced in the National
3 Asbestos Workers case, there were a number of other
4 lists which purported to include all the documents
5 reviewed by LECG.

6 So it's not just this reliance list
7 and this report that has been produced to the
8 National Asbestos Workers plaintiffs, in connection
9 with documents he has reviewed.

10 MR. MINTZER: Okay. But as far as
11 the documents he's relying on, as opposed to the
12 documents he has reviewed, is that the list or are
13 you telling me you have incorporated those additional
14 lists yourselves?

15 MR. STREETER: I -- I mean, I leave
16 that to the testimony he has given.

17 MR. MINTZER: Okay.

18 MR. STREETER: But I just wanted,
19 for the record -- for it to be clear that you had the
20 production of lists of many more thousands of
21 documents that were reviewed in connection this
22 matter.

0328

1 MR. MINTZER: Okay.

2 BY MR. MINTZER:

3 Q Have you reviewed any other expert
4 reports, plaintiff expert reports, in the National
5 Asbestos Workers case besides Dr. Phillips' report?

6 A Remind me who some of the other experts
7 are.

8 Q We have a Dr. Harris. We have Benowitz.
9 There was a Dr. Cleary and Dr. D'Orducci.

10 A Well, I -- I -- see, I've read reports by
11 Dr. Benowitz. And this is listed as "the"
12 Dr. Harris? So -- okay.

13 So -- I've read -- my report clearly
14 focuses on Dr. Phillips. I've read Dr. Benowitz' and
15 Dr. Harris' reports in connection with, you know,
16 some matters.

17 Q Okay. So you don't recall whether you
18 read his report in the National Asbestos Workers
19 case, specifically?

20 A I think I may -- I -- you know, I think I
21 looked at Professor -- Dr. Benowitz, because I don't
22 know whether -- that may have been the first time

0329
1 that I read a report by him. But -- bit I don't
2 know.

3 Q Okay.
4 MR. STREETER: Just for the record,
5 in terms of your list of experts --

6 MR. MINTZER: It's not adjusted.

7 MR. STREETER: Right.

8 Many others than that.

9 BY MR. MINTZER:

10 Q This morning you talked a little bit
11 about the assistance that you got from Navigant -- is
12 that correct? -- Consulting, in doing your report?

13 A Yes.

14 Q At least, you did -- it was -- the
15 question was asked as to Blue Cross and Blue Shield.

16 And I would just ask: As far as the
17 National Asbestos Workers report that you prepared,
18 did you also receive that same assistance regarding
19 the documents that you testified to this morning?

20 A Yes.

21 Q Okay. Did they provide you any other
22 assistance, other than the document collection that

0330
1 you talked about this morning?

2 A Oh, yeah. Yes.

3 Q Okay. And what kind of assistance was
4 that?

5 A Okay. Well, they -- they -- I, in most
6 cases, didn't create tables of numbers or graphs
7 or -- you know, physically at the computer -- or I
8 did in some -- but in most cases, it was done under
9 my direction by research assistants or at least
10 compiling data, reviewing documents, and discussing
11 documents.

12 I worked closely with some people on
13 this, in reviewing -- in reviewing the complaint,
14 reviewing the documents, planning -- you know,
15 deciding what was being in the report, working out
16 how the report would come into creation.

17 Q How many different people worked on the
18 report -- I could say, the National Asbestos Workers
19 case. I know, at least, I'm making the assumption
20 that your reports are somewhat cumulative. And if
21 that assumption's wrong, let me know. But --

22 A So you're asking specifically for

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1 National Asbestos Workers?

2 Q I would say for all the reports that
3 you've done; but if it was different from National

4 Asbestos Workers, then -- anybody else -- then I
5 certainly would want to know that.
6 A Well, if we go back to Minnesota, from
7 the beginning, we had -- you know, there -- we've had
8 a lot of work people work on this over time, when we
9 started from the beginning.

10 By the time we got to National Asbestos
11 Workers, a lot of -- a lot of the basic work already
12 had been done. So, a much fewer number of people by
13 that time.

14 Q Okay. Can you tell me how many people or
15 approximately how many people during the Minnesota
16 situation worked with you?

17 A Oh, we probably had more than 20 people
18 doing various things at various times.

19 Q Well, what about for National Asbestos
20 Workers, for that report; how many people assisted
21 you? Sorry.

22 A Well, we have -- in terms of doing any

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1 significant amount of things, my guess is less than
2 10. But there may be -- you know, there may be some
3 people who did some hours doing some things. But we
4 were the main people doing things.

5 Q Okay. You talked this morning about some
6 interviews that you did of people at Philip Morris.
7 Did you take any notes at those interviews or
8 otherwise record the interviews?

9 A No.

10 Q Do you have a -- a recollection of, when
11 you spoke with Cathy Ellis, what topics, generally,
12 were covered or that -- let me strike that.

13 Were there specific topics that you went
14 to Philip Morris with, when you spoke to Cathy Ellis,
15 that you brought up that you wanted to discuss?

16 A Well, I read Cathy Ellis's deposition and
17 testimony -- at least, deposition and a number of
18 things. She was one of the Philip Morris employees
19 put forward to talk about R&D and science in Philip
20 Morris.

21 And so, I -- I was learning more about,
22 you know, biological testing and other sorts of --

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1 other sorts of scientific work.

2 And -- and a lot of it was about Accord,
3 which was not allowed to be included in the Minnesota
4 case. And so, I didn't know a lot about it. And so,
5 I went and I actually saw an Accord. And then we
6 talked but how it was -- came into being and how it
7 was being -- etc.

8 Q Are there any other -- I'll call them
9 "projects" or "products" that you recall speaking to
10 Cathy Ellis about?

11 A There were -- you know, I talked -- we --
12 we -- I had -- I was familiar with her and her other
13 Philip Morris testimony, in which there was a general
14 discussion of the history of Philip Morris's R&D
15 activities.

16 And I -- I -- I asked -- I can't remember
17 specifically what. But I asked some things about
18 some specific things that appeared in documents
19 about -- or that I didn't seem to have as much
20 information about what that -- what this research

21 project was about.
22 And we talked about the multi-filter or
0334
1 some things like that, which I since know
2 considerably more about than I did at that time.
3 Q Did you speak to anybody at Philip Morris
4 in the marketing department?
5 A Well, as I said, someone in -- well,
6 someone in sales, as I said, in Minnesota.
7 I talked to someone, I think, in
8 international marketing.
9 Q Do you remember who that was?
10 A No.
11 Q Okay. With respect to RJ Reynolds, again
12 did you take any notes or otherwise record the
13 interviews that you did or that you had there?
14 A No.
15 Q And I believe you said, you talked to
16 Mr. Townsend at RJ Reynolds?
17 A He was one of the number of people that
18 were there.
19 Q Okay. Do you recall -- did you have
20 specific questions for Mr. Townsend?
21 A One of the -- one of the main reasons for
22 visiting RJR was to actually see, in -- in real life,
0335
1 the manufacture -- you know, and talk about the
2 manufacturability of Premier and Eclipse, to see --
3 and see cigarettes being manufactured, and talk with
4 manufacturing people and other people on
5 manufacturability issues.
6 We talked more about Premier; in general,
7 about what -- what people in the company had done in
8 various respects, like going and -- elaborated more
9 than in the documents about very extensive efforts by
10 company people to go out and put on presentations for
11 health-care groups or anyone that was interested in
12 talking, to tell them about the science and the
13 product Premier -- what -- and what it -- what it was
14 trying to accomplish and what the -- what the data
15 seemed to show.
16 Q Is there any reason why you didn't speak
17 to anybody from the other tobacco companies?
18 A No. A lot of this -- as I said, the -- a
19 lot of this was -- the focus was on Premier, Eclipse,
20 Accord, De-Nic, things in which -- because of the
21 recent nature and stuff, the documents weren't so --
22 weren't so clear about what -- various things about
0336
1 them, and that -- and in -- some of them were not --
2 you know, were not subject to testimony, were not
3 allowed to be subject to testimony in Minnesota.
4 So this was sort of doing -- getting sort
5 of more information on that, so we don't have a
6 similar BMW product or Lorillard or Liggett product
7 like that. That was the main reason.
8 Q Okay. Also this morning, you talked
9 about how you obtained the documents that you looked
10 at for your report.
11 And you said that you conducted a review
12 of the documents in Minnesota, and also you were
13 given some documents by attorneys; is that correct?
14 MR. STREETER: Objection.

15 A Well, I -- I mean, there were three
16 classes of things: One, through the complaint and
17 other science experts' reports and other of these
18 sorts of things and things in litigation -- and I got
19 the documents that were offered by the other side.
20 We always have the documents of -- of -- of the -- of
21 the plaintiffs and their experts in all cases.

22 Then we did our on search, partly in -- a
0337

1 lot of it was in the archive in Minneapolis. But in
2 other cases, we asked counsel -- because the archive
3 was not very easy to search -- "Can you give us some
4 more documents on this, like Premier, like Eclipse,
5 like XA, like Hill and Nolton stuff, and -- you know,
6 gentlemen's agreements or -- you know, anything --
7 you know, any agreement you could find?" -- okay?

8 And we found a lot of stuff.

9 As I indicated, I -- in my Minnesota
10 report, I cited a number of documents in which there
11 were statements someone could interrupt as being
12 consistent with an agreement that weren't -- that
13 didn't show up on the other side.

14 We kind of do a complete search and see
15 if we can find whatever is -- how many documents --
16 things like that.

17 Q Okay. So you only got documents from
18 counsel when you requested them? You didn't start
19 off by getting any documents from counsel?

20 A Well, we started at the very beginning by
21 getting the complaint. So there was a report at that
22 point and there was a lot of documents -- we got a

0338
1 lot of documents in connection with that.

2 And we -- as we formulated a research
3 plan and understood better what the issues are, we
4 said, "Look, we need to have -- you know, we need to
5 get a handle on documents about research and
6 development, not advertising -- on new product
7 introduction, on -- you know, contacts between the
8 companies and other sorts of things," like -- you
9 know, general topics of --

10 Q Do you know whether the documents that
11 you received from counsel, that you requested in
12 those categories you've mentioned, were also
13 available in the Minnesota depository?

14 A Did I receive something that wasn't in
15 the Minnesota depository?

16 Q Right; if you know.

17 A I don't know.

18 Q Do you ever go on the Internet and do
19 your own search of any tobacco company documents?

20 A No.

21 Q Have you spoken to any other defense
22 experts in the National Asbestos Workers case?

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1 A You mean, as a -- on the substance of the
2 case?

3 Q Yes.

4 A No.

5 Q Have you completed your work on arriving
6 at your conclusions in the National Asbestos Workers
7 case?

8 A Well -- yes. I'm continuing to work on

9 other cases. So we're continuing to work on -- as I
10 said to Mr. Angland, we continue to -- I think we've
11 got pretty much all -- we find something now and
12 then -- on getting more of the early history of
13 the -- you know, the first 20 years or so, the
14 history in the U.S., we still find -- things pop up.

15 And -- and on international matters --
16 although we pretty much exhausted that, we think --
17 but we're -- we're still exploring.

18 And, as I said, and also looking at
19 developments, recent developments, given the changes
20 in the industry, both regulatory and then the
21 companies' positions.

22 Q You talked about, probably earlier this
0340

1 afternoon, the process in the actual drafting of the
2 report in the Blue Cross/Blue Shield case.

3 Would the same comments you made apply to
4 the report as it was prepared in the National
5 Asbestos Workers case, as far as you did the drafting
6 and so forth? Or was it different?

7 A It was similar.

8 By the -- by the time we got the Blue
9 Cross case, I had written six or seven reports
10 already, including -- National Asbestos Workers was
11 the first major report written, if I remember right,
12 since the Ohio testimony.

13 So that was a -- a -- a more significant
14 thing, in the sense that it was to incorporate a lot
15 of what had been developed in Ohio, since we had done
16 a lot in Ohio and, after, did a lot of research on
17 international and other countries and on -- more on
18 the early history in the U.S.

19 And so, that was -- it was more -- in a
20 sense, we had more new snuff, in a way, by the time
21 we wrote that report than we did by the time of the
22 Blue, in terms of background information.

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1 Q So does that mean that you participated
2 more in the drafting of the National Asbestos Workers
3 report?

4 A I'm saying that the report, if you --
5 the report was -- it was, in some sense, less a --
6 less a assembly of -- of some of the material from
7 past reports than it was by the time we got to Blue
8 Cross.

9 Q Did you ever receive a -- a research
10 grant from the counsel for tobacco research?

11 A No.

12 Q What about Tobacco Institute, have you
13 ever received a research grant them?

14 A No.

15 MR. MINTZER: I don't have anything
16 else.

17 MR. ANGLAND: Nothing further.

18 VIDEOGRAPHER: Off the record at
19 4:33. End of Tape No. 3.

20 (Whereupon, signature not having been waived, the
taking of the deposition concluded at 4:33 p.m.)

21

* * *

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1 ACKNOWLEDGMENT OF DEPONENT

2 I, David T. Scheffman, Ph.D., do hereby
3 acknowledge I have read and examined the foregoing
4 pages of testimony, and the same is a true, correct,
5 and complete transcription of the testimony given by
6 me, and any changes and/or corrections, if any,
7 appear in the attached errata sheet signed by me.

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Date

David T. Scheffman, Ph.D.

1 CERTIFICATE OF NOTARY PUBLIC

2 I, Susan D. Ashe, the officer before
3 whom the foregoing deposition was taken, do hereby
4 certify that the witness whose testimony appears in
5 the foregoing deposition was duly sworn by me; that
6 the testimony of said witness was taken by me in
7 stenotype and thereafter reduced to typewriting
8 under my direction; that said deposition is a true
9 record of the testimony given by said witness; that
10 I am neither counsel for, related to, nor employed
11 by any of the parties to the action in which this
12 deposition was taken; and further, that I am not a
13 relative or employee of any attorney or counsel
14 employed by the parties hereto, nor financially or
15 otherwise interested in the outcome of the action.
16
17

Notary Public in and for the
District of Columbia

18
19 My commission expires:
20 May 31, 2001
21
22